Supreme Court, U.S.
FILED

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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

KENNETH HELLER,

Petitioner,

v.

JEANNETTE YANNITELLI, indidually and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of the State of New York, Appellate Division First Department

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state court summarily deprive an attorney of his legal fees in excess of $700,000.00 without a criminal jury trial, where the deprivation was based upon disputed facts contained in affidavits submitted by the attorney's client during a fee dispute between the attorney and his client?

2. Does due process permit a state court to deprive an attorney of an evidentiary hearing, prior to, and subsequent to, declaring that the attorney's legal fees in excess of $700,000.00 have been forfeited?

3. Whether due process requires recusal, where a judge admits, on the record, that an attorney appearing before her is her political protagonist, particularly when that judge acts as accuser, fact finder and sentencing judge in depriving the attorney of his legal fee in excess of $700,000.00 for alleged misconduct?

4. Whether an attorney's forfeiture of $700,000.00, representing the legal fees due for over eighteen (18) years of work in a wrongful death action, for alleged violations of the Code of Professional Responsibility is excessive, in the absence of any indicia of resulting harm to the attorney's client?

INTERESTED PARTIES

The following parties and entities were parties below and have an interest in the outcome of the case:

1. Jeannette Yannitelli;

2. Albert J. Yannitelli, as Administrator of the Estate of Donato Yannitelli.

The following parties and entities were parties below, but do not have an interest in the outcome of the case:

3. D.Yannitelli & Sons Construction Corp.;

4. Mid-Hudson Aircraft Repair, Inc.;

5. John P. Dennis.

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Respondent.

On Petition for Writ of Certiorari to The Supreme Court of the State of New York, Appellate Division First Department

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Order of the Supreme Court of New Hampshire entered in this proceeding on April 24, 1998.

PRELIMINARY STATEMENT

Petitioner, Kenneth Heller, an attorney who represented Jeannette Yannitelli and Albert J. Yannitelli, as Administrator of the Estate of Donato Yannitelli, in a wrongful death action in the New York State Supreme Court, Petitions for a Writ of Certiorari to review the Memorandum decision and Order of the Supreme Court, Appellate Division, First Department, entered on February 17, 1998, affirming the forfeiture of his legal fees in excess of $700,000. (1a-2a).

OPINIONS BELOW

The opinion and Order of the Supreme Court, Appellate Division, First Department, is reported at --- A.D.2d ---, 668 N.Y.S.2d 613 (1st Dept. February 17, 1998). The opinion and Order of the Appellate Division is reprinted as Appendix A.

The decision and order of the lower court are not officially reported and are reprinted at Appendices B and C, respectively.

The Order of the New York State Court of Appeals, denying discretionary review is reported at 92 N.Y.2d 875, 700 N.E.2d 317, 677 N.Y.S.2d 777 (July 9, 1998) and reprinted at Appendix D, and the Order of the New York State Court of Appeals, denying rehearing on September 15, 1998, is not officially reported and is reprinted at Appendix E.

STATEMENT OF JURISDICTION

The decision and Order of the New York State Supreme Court, Appellate Division, First Department was entered on February 17, 1998, affirming the Order below, depriving Petitioner of his legal fees in a wrongful death action. (1a-2a)

Petitioner's motion to reargue or for leave to appeal to the Court of Appeals was denied by the Appellate Division order dated April 30, 1998.

Petitioner's motion for leave to appeal was denied by the New York State Court of Appeals on July 9, 1998, and rehearing was denied September 15, 1998. (32a-33a)

This Petition for a Writ of Certiorari is filed within ninety days of the entry of the September 15, 1998 Order of the Court of Appeals, denying rehearing of Petitioner's motion for appellate review. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(a)(1970).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law . . .. U.S. Const. Amend V

The Sixth Amendment to the United States Constitution states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. U.S. Const. Amend VI.

The Eighth Amendment to the United States Constitution states that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const. Amend VIII.

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

> nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend XIV, §1.

STATEMENT OF THE FACTS

Petitioner, Kenneth Heller, an attorney who has practiced in the State of New York for approximately 44 years, represented Jeanette Yannitelli in the wrongful death action of her husband, Donato Yannitelli. (3a-4a) Mr. Heller had known the Yannitelli family for many years prior to the unfortunate loss of Mr. Yannitelli, and had previously represented other members of the Yannitelli family.

Mr. Heller also represented the interests of Donato Yannitelli's four surviving sons and a daughter from a prior marriage, as beneficiaries entitled to equal shares in the wrongful death action.(4a)

The wrongful death action involved literally years of Mr. Heller's hard work, including his successful opposition to summary judgment, an appeal and a mistrial in 1992. (7a) After a seven week trial, costing Mr. Heller's firm approximately $144,000.00, the jury was split, with three (3) jurors committed to awarding $0 to the plaintiffs. The offer made by the Defendants at that time was

$20,000. However, due to the skill, tenacity and experience of the Petitioner, the case resulted in two separate settlements totalling $2,700,000. (7a, 9a)

The first settlement, against Defendants Mid-Hudson Aircraft Repair, Inc. and John P. Dennis was approved on May 5, 1992, by the New York State Supreme Court, (Greenfield, J.S.C.) for the full amount of the insurance policy of $1,000,000.00. (7a) After deducting allowable disbursements, the court awarded Mr. Heller his one third (1/3) contingency fee, according to the fee agreement in his retainer signed by Mrs. Yannitelli. (7a-8a)

The remaining Defendant settled in June, 1995, for the amount of $1,700,000.00, this time before acting Supreme Court Justice Beverly Cohen. Justice Beverly Cohen made an unprovoked statement in open court, on the record, that Mr. Heller was her political protagonist and that she had heard two reports that Mr. Heller was supporting a Jewish candidate to run against her in her next election for Civil Court Judge. (9a, 44a) Mr. Heller immediately moved for Justice Cohen's recusal, but Justice Cohen promptly denied his application. (11a)

After a fee dispute developed between Mr. Heller and Mrs. Yannitelli, including the amount of allowable disbursements and Petitioner's contingency fee, Mrs. Yannitelli submitted a motion to have Mr. Heller's fee declared forfeited. (11a-12a) In her affidavits, Mrs.

Yannitelli accused Mr. Heller of multiple violations of the Code of Professional Responsibility, all of which were alleged to have occurred outside the courtroom. (15a-19a)

Mr. Heller denied the allegations and demanded a jury trial, or at the very least, an evidentiary hearing to determine the veracity of the allegations brought against him by Mrs. Yannitelli. (*See e.g.* 34a-38a)

Justice Beverly Cohen, showing a particular hostility towards Mr. Heller, denied Petitioner's request for an evidentiary hearing, and declared that Mr. Heller should only be reimbursed for a mere $10,000 of the $144,000 he invested and disbursed in prosecuting the civil action. (19a-20a) Then, astonishingly, Justice Cohen summarily declared, on the basis of the disputed affidavits of Mrs. Yannitelli, that Mr. Heller forfeited his entire contingency fee, in excess of $560,000.00. (19a) The total loss to Mr. Heller's firm exceeded $700,000.

This, despite the fact that Mrs. Yannitelli, who represented only one-sixth of the total recovery (approximately $90,000 of the contingency fee), was the only client who complained about any alleged misconduct of Mr. Heller. Moreover, none of the conduct complained of was found to have damaged or prejudiced Mrs. Yannitelli, or the other beneficiaries, in the action for which Mr. Heller provided them with legal representation. Nevertheless, Mr. Heller lost his entire fee in a legal matter that spanned some eighteen (18) years, and took

thousands of hours of legal work successfully complete.

Mr. Heller appealed the Decision and Order of Justice Cohen, which was promptly affirmed by the Supreme Court, Appellate Division, First Department. (1a-2a) The New York State Court of Appeals denied discretionary review. (32a-33a)

THE PROCEEDINGS BELOW

Mr. Heller appealed Justice Cohen's Order to the New York State Supreme Court, Appellate Division, First Department. Mr. Heller claimed, *inter alia*, that the fee forfeiture was a deprivation of due process, his right to a criminal jury trial and was clearly excessive. Moreover, Mr. Heller argued that Justice Beverly Cohen should have recused herself, after making unprovoked statements, on the record, that Mr. Heller was a political protagonist of hers, and she demonstrated significant and personal bias by the judgment rendered, which deprived Mr. Heller's firm of over $700,000.

The Appellate Division unanimously affirmed Justice Cohen's Decision and Order. (1a-2a). Mr. Heller subsequently moved to reargue, or in the alternative, for leave to appeal to the Court of Appeals. The motion was denied in its entirety.

Finally, Mr. Heller filed a motion for leave to

appeal to the New York State Court of Appeals, directly in the Court of Appeals, according to state procedure. The motion was denied. (32a) A motion for a rehearing by the Court of Appeals was also subsequently denied. (33a)

REASONS FOR GRANTING WRIT

THE DEPRIVATION OF PETITIONER'S LEGAL FEES, IN EXCESS OF $700,000.00, WITHOUT A CRIMINAL JURY TRIAL, OR AT THE VERY LEAST, AN EVIDENTIARY HEARING, IS A COMPLETE DEPARTURE FROM THE DECISIONAL LAW OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, RESPECTING THE CONSTITUTIONAL LIMITS UPON THE POWER OF A TRIAL COURT TO IMPOSE PUNITIVE SANCTIONS.

The Appellate Division, First Department, affirmed the trial court's deprivation of Petitioner's legal fees in excess of $700,000.00, without a jury trial or evidentiary hearing, based mostly, if not solely, upon the disputed affidavits of the attorney's client, who was engaged in a fee dispute with the attorney. (1a-2a)

The Court, apparently premised its authority to summarily levy such a severe punishment against

Petitioner upon the court's inherent power to discipline attorneys practicing before the court. Much like the power of contempt, however, this common law power is, or should be, limited by the mandates of the United States Constitution.

This Court, in *International Union v. Bagwell*, found that "[w]here a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge." 512 U.S. 821, 829 114 S. Ct. 2552, 2558 (1994). Moreover, to the extent that contempts "take on punitive character, however . . . criminal procedural protections may be in order." *Id.*, at 831, 114 S. Ct., at 2559.

The trial court's contempt power concerned the *Bagwell* Court because it "uniquely is 'liable to abuse'," inasmuch as it left the "offended judge solely responsible for identifying, prosecuting, adjudicating and sanctioning the contumacious conduct." *Id.*, at 831, 114 S. Ct., at 2559. Since it was determined that the *Bagwell* sanctions were punitive and serious, the Court concluded that "the serious contempt fines here were criminal and constitutionally could not be imposed absent a jury trial." *Id.*, at 838, 114 S. Ct., at 2563. Therefore, this Court reversed the judgment of the Supreme Court of Virginia.

The Court of Appeals for the Second Circuit, following *Bagwell, supra*, recently held that "although the imposition of a sanction for litigation misconduct is not technically a conviction of a crime, the $10,000 sanction

imposed in this case required the protections of a criminal procedure." *Mackler Productions, Inc. v. Cohen*, 146 F.3d 126 (2d. Cir 1998). While recognizing the court's "inherent power to protect orderly administration of justice and to preserve the dignity of the tribunal," the *Mackler* Court also recognized that "sanctions and contempts raise certain similar concerns," and cited the precise abuses noted in *Bagwell*. *Id.*, at 129-30. This is particularly so, as the "absence of limitations and procedures can lead to unfairness and abuse." *Id.*, at 128.

The instant case is analogous to *Bagwell* and *Mackler*, in that the forfeiture of Petitioner's legal fees, in excess of $700,000, was imposed for prior conduct which allegedly occurred outside the courtroom, without any opportunity on the part of Petitioner to purge any alleged wrongdoing. *See also New York State National Organization of Women v. Terry*, --- F.3d ---, *slip opinion, 97-7217, 1998 WL 734329 (2d Cir. October 21, 1998)(distinguishing Ba*gwell, supra, noting that "the absence of a purge provision was significant because it suggested the trial court's objective was not to coerce but to punish.") Moreover, the fines in the instant case were not compensatory at all, but rather, solely punitive in nature.

Finally, the authority to order the severe, punitive sanctions in the instant case similarly arises from the inherent powers of the court, as do its contempt powers, which are fraught with the same dangers of abuse

recognized in *Bagwell, supra* and *Mackler, supra*. Moreover, the punishment was undertaken in the complete absence of any limitations or procedures. Justice Beverly Cohen, the offended judge, undertook the sole responsibility for identifying, prosecuting, adjudicating and sanctioning the contumacious conduct. Justice Cohen summarily deprived Petitioner of his legal fees without a jury trial, or any evidentiary hearing at all.

Certiorari is sought not only to reverse the forfeiture of over $700,000 in legal fees by the attorney Petitioner, representing some eighteen (18) years of his labor, but also to correct the common law of the State of New York, which is at complete variance with federally mandated constitutional protections and limitations on a state court's inherent powers to punish attorneys practicing before it.

The ease at which the Appellate Division affirmed the Supreme Court's deprivation of Petitioner's fees should not pass unnoticed. (1a-2a) The Appellate Division, in this case the last court of meaningful resort, found "no material disputed factual issues requiring an evidentiary hearing." (2a). Despite the allegations levied by Petitioner's client, which were clearly disputed, the Petitioner was entitled to a criminal jury trial before such severe and criminal sanctions could be imposed.

Finally, the Court of Appeal's refusal to grant discretionary review of such an enormous violation of

Petitioner's constitutional rights demonstrates a complete and utter disregard for federally mandated constitutional protections as to warrant this Court's intervention.

THE STATE COURTS COMPLETELY AND UTTERLY DISREGARDED THE PROTECTIONS OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The forfeiture also flies in the face of well established Supreme Court precedent construing the protections afforded by the Excessive Fines Clause of the Eighth Amendment. As noted in more detail below, the forfeiture was clearly and solely punitive, and therefore, a "fine" subject to Eighth Amendment protection. *See United States v. Bajakajian*, 118 S.Ct. 2028 (1998).

Moreover, the fine was clearly "excessive," inasmuch as it was grossly disproportionate to any alleged wrongdoing, particularly where no harm to the client was alleged, proved, nor even considered by the courts.

Even more egregious was the complete failure of the New York State Supreme Court and the Appellate Division to conduct any meaningful excessive fine analysis to ensure constitutionality of the $700,000 forfeiture. The clear departure from necessary

constitutional protections by the New York State courts, and the inability to obtain review from the New York Court of Appeals warrants this Court's intervention.

The mandate from this Court, in *Bagwell, supra* and followed by the Second Circuit in *Mackler, supra*, clearly sets limits, responsibilities and procedures that must be adhered to before a court, acting upon its inherent abilities, may sanction a party or attorney, or hold them in contempt. Petitioner's forfeiture, in excess of $700,000 was criminally punitive in nature, and excessive, under any analysis. Unless this Court provides the New York State Courts with guidance, procedures and/or limitations on their inherent powers to punish attorneys, Constitutional safeguards intended to afford such protections will vanish.

POINT I

BEFORE A COURT ENDEAVORS TO IMPOSE CLEARLY SEVERE SANCTIONS AND/OR FINES TO PUNISH AN ATTORNEY FOR HIS ALLEGED MISCONDUCT, A JURY TRIAL IS REQUIRED.

This Court stated in *International Union v. Bagwell*, 512 U.S. 821, that "a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent

opportunity to reduce or avoid the fine through compliance." *Id.*, at 829 (citing *Penfield Co. of Cal. v. SEC*, 300 U.S. 585, 590, 91 L.Ed. 1117, 67 S.Ct. 918 (1947).)

Moreover, while the "Courts independently must be vested with 'power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates," the contempt power "uniquely is 'liable to abuse'." *Id.*, at 831 (citing *Bloom v. Illinois*, 391 U.S. 194, 202, 20 L.Ed. 2d 522, 99 S. Ct. 1477 (1968).) This is particularly true, inasmuch as such inherent powers "leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *Id.*

Similarly, the court's ability to punish attorneys for their alleged misconduct and alleged violations of the rules of ethics, which occurs outside the courtroom, stems from the same inherent powers of the court and is subject to the precise dangers enunciated in *Bagwell, supra.* Inasmuch as the statutory mechanism in New York for attorney discipline rests with the Supreme Court Appellate Division, rather than the Supreme Court, where Petitioner was severely sanctioned, New York's common law provides little, if any, safe guards against the vast power it supplied to the instant trial Court.

Thus, the courts' power to punish attorneys is likewise susceptible to the same potential for abuse of

power, and lack of adequate procedure. Therefore, the standards and constitutional requirements enunciated in *Bagwell*, are properly and justly applied to cases in which the Court undertakes to punish an attorney through fee forfeiture.

In the case at bar, Petitioner was deprived of attorneys fees in excess of $700,000. This deprivation occurred as an afterthought, inasmuch as the case was completely settled, the settlement funds were remitted by all Defendants, and the only issues which remained were the allowable disbursements, and the approval of the contingency fee of an attorney who had labored for eighteen (18) years on the case.

The Court below made no findings that would leave anyone to believe that any fines or forfeitures were compensatory. The Court made no determination of damages stemming from Jeanette Yannitelli's allegations, if any damages were suffered at all. In fact, all evidence points to the contrary. Petitioner successfully obtained settlements totalling $2,700,000 in a case which resulted in mistrial, with a standing settlement offer of only $20,000. The deceased was a principal and employee of the Defendant corporation, leaving liability difficult to establish. However, due to the experience and persistence of the Petitioner, Jeanette Yannitelli and her sons achieved a significant monetary award.

Furthermore, Justice Beverly Cohen recognized

that Jeanette Yannitelli opposed Mr. Heller's application to withdraw as her counsel after the first settlement was reached before Justice Greenfield (9a). Inasmuch as Jeanette Yannitelli pressed for Petitioner's continued representation, she agreed with Justice Greenfield and Petitioner to hold her share of the first settlement in escrow, to provide security for loans owed by her to Mr. Heller. Clearly, issues of fact and credibility were raised as to any damages suffered by Jeanette Yannitelli as a result of Petitioner's representation, particularly where she earlier insisted on such representation. Jeanette Yannitelli's credibility was also the subject of substantial dispute, in that Petitioner, and others, submitted affidavits that she stole money and promissory notes, and conducted other illegal and/or fraudulent acts against Petitioner and others. (3a-6a, 34a-38a, 39a-41a)

More importantly, Mrs. Yannitelli, the only complaining client, represented only a one-sixth share of the entire proceeds, amounting to approximately $90,000 of Mr. Heller's total contingency fee. Nevertheless, Mr. Heller was deprived of his entire fee (over $560,000), and most of his unreimbursed expenses. Clearly, neither compensation, nor substantial justice were the purpose of Petitioner's forfeiture of his entire contingency fee.

Furthermore, Mr. Heller was not given an opportunity to purge the alleged violations. Moreover, the fines were not necessary for the orderly conduct of the court's business, inasmuch as the case was settled, and all

that remained was the distribution of the settlement proceeds. Finally, this fine was levied for prior conduct which was alleged to have occurred outside the courtroom. All of this was achieved by Justice Cohen, sitting as accuser, prosecutor, fact finder, and sentencing judge, after she make unprovoked allegations on the record that Petitioner was her political protagonist.

Clearly, under any test, the fine was purely punitive. In addition, the severity of the forfeiture, in excess of $700,000, is clearly criminal in nature.

Inasmuch as the criminal forfeiture arose from the same inherent powers of the court as contempt, and those inherent powers are fraught with the same potentials for abuse enunciated in *Bagwell, supra*, a criminal jury trial, and other protections afforded to criminal defendants by the Sixth Amendment, were required. Severe criminal sanctions imposed by a state court judge, acting as accuser, prosecutor, fact finder and sentencing judge, pursuant to a vague common law authority, in the absence of safe guards, limitations and/or procedures, violate the express and time honored right to a criminal jury trial.

POINT II

DUE PROCESS REQUIRED A PRE-DEPRIVATION OR POST-DEPRIVATION HEARING BE PROVIDED BEFORE OR AFTER THE DEPRIVATION OF FEES IN EXCESS OF $700,000.

The forfeiture ordered and affirmed by the courts below also raise serious and significant due process concerns. In *Satcorp v. China National Silk Import & Export Corp.*, the United States Court of Appeals for the Second Circuit reversed a $10,000 punitive fine levied by the United States District Court for the Southern District of New York, finding that "[t]he Constitution requires the provision of procedural protections before a non-compensatory, punitive fine can be demanded from a party or from an attorney." 101 F.3d 3, 5 (2d Cir. 1996); *see also Rogal v. American Broad. Cos., Inc.*, 74 F.3d 40, 44 (3d Cir. 1996)("The imposition of monetary sanctions by a court implicates fundamental notions of due process and thus requires 'fair notice and an opportunity for a hearing on the record.'")(quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S. Ct. 2455, 2464, 65 L.Ed.2d 488 (1980).)

In the case at bar, the trial court failed to conduct an evidentiary hearing, although the same was repeatedly requested by Petitioner. In fact, the authority employed by

the courts to deprive Petitioner of over $700,000 in legal fees involved no procedure or limitation at all, and thus, a summary ruling against Mr. Heller was rendered, imposing criminal sanctions without a hearing. Inasmuch as serious issues as to the credibility of Petitioner's client were raised, and the fact that most, if not all, of the allegations levied against Petitioner by his client were disputed, Petitioner was entitled to, at the very least, an evidentiary hearing before being deprived of all of his legal fees.

Mr. Heller was deprived of a significant amount of money without any meaningful pre-deprivation or post-deprivation hearing. Due process and fundamental fairness abhor such a result as was reached by the New York courts, and this Court should grant Certiorari to set limits and standards upon state courts' now unlimited, inherent powers to punish attorneys practicing before the courts, without the use of procedures to safeguard constitutional rights.

POINT III

JUDGE BEVERLY COHEN DEMONSTRATED PERSONAL BIAS AND ANIMOSITY TOWARD PETITIONER, AND SHOULD HAVE RECUSED HERSELF FROM ANY DETERMINATION OF FEE FORFEITURE BY PETITIONER.

Judge Beverly Cohen exhibited significant and specific personal bias and animosity against Petitioner, and therefore, due process required her recusal from the determination of Petitioner's fee forfeiture. In *Aetna Life Insurance Co. v. Lavoie*, this Court noted that "it certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." 475 U.S. 813, 820, 106 S.Ct. 1580, 1584 (1986)(quoting *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 441 (1927).)

In the present case, Judge Beverly Cohen, on March 5, 1996, openly stated on the record, in pertinent part:

> Good morning. I just wanted to say something about Yannitelli against Yannitelli matter. Of course we have here Heller against Yannitelli too. I just wanted

> to report that I am running for reelection this year to the civil court and I have received two reports that Mr. Heller was looking for a Jewish candidate to run against me . . ..

Justice Cohen's unprovoked remarks about the alleged political activities of the Petitioner compelled Mr. Heller to seek Justice Cohen's recusal, which he did at the next court appearance on March 7, 1996. (11a) The application was promptly denied by Justice Cohen. *Id.*

Shortly thereafter, Justice Cohen deprived Mr. Heller of all of his fees earned on the $1,700,000 settlement before her, in the absence of an evidentiary hearing. This, despite the fact that the only complaining client represented only $90,000 of the nearly $560,000 in contingency fees forfeited by Mr. Heller.

Clearly, Justice Cohen's perceived challenge to her election to the civil court was a direct, personal, substantial and pecuniary interest. Due process clearly required Justice Cohen to recuse herself from deciding whether Petitioner, a perceived political protagonist, would forfeit his legal fees based upon the affidavits of his client. Moreover, Justice Cohen's decision, depriving Petitioner of fees in excess of $700,000, without substantial inquiry, jury trial, procedures or limitation, plainly exhibited the judge's personal bias against Petitioner, in direct violation of his due process rights.

POINT IV

PETITIONER'S FORFEITURE OF OVER $700,000 WAS CLEARLY EXCESSIVE, IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The forfeiture ordered against Petitioner and affirmed by the New York courts was clearly punitive in nature, thus invoking the protections of the Eighth Amendment against excessive fines. In *United States v. Bajakajian*, this Court found that a forfeiture resulting from the failure to report the transportation of over $10,000 "constitutes punishment." 118 S.Ct. 2028, 2033 (June 22, 1998). The considerations of the *Bajakajian* Court included whether the forfeiture served a remedial purpose, and whether the government proceeded against the accused directly, rather than proceeding *in rem* against the property. *Id.*, at 2035-36.

The present case concerns a forfeiture that clearly served no remedial purpose. Rather, the forfeiture of Petitioner's legal fees, in excess of $700,000, for his alleged violations of the Professional Code of Responsibility was purely punitive in nature. The action was taken by the Court, without a hearing, directly against the Petitioner/attorney. There was no "remedial purpose," inasmuch as the New York State Supreme Court does not have any statutory power to discipline attorneys. Rather,

the power to discipline attorneys rests exclusively with the Supreme Court Appellate Division, which must, *inter alia*, conduct an investigation and hearing under a strictly regulated set of procedures before dispensing discipline.

Thus, the forfeiture was a "fine," falling clearly within the ambit of the protections of the Eighth Amendment.

This Court has stated that:

> The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of he offense that it is designed to punish. *Bajakajian, supra*, at 2036.

Moreover, in determining the standard, this Court found that:

> a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense. Id.

One strong factor to be considered is the harm that was caused. *Id.*, at 2038-39. Another consideration is whether the money forfeited comprised the proceeds of any illegal activities. *Id.*, at 2038.

Not only does the Excessive Fines Clause apply to the instant forfeiture, it clearly violates this constitutional protection. First, the fine, in excess of $700,000, is grossly disproportionate to any alleged wrongdoing of the Petitioner. Even an attorney who is disbarred in New York would be paid in *quantum meruit*, for work performed and disbursements made "prior to the effective date of the disbarment . . .." *See* N.Y. Ct. Rules §603.13.

None of the allegations levied against Mr. Heller warranted a $700,000 fine. The fine was grossly disproportionate and, therefore, unconstitutional. Despite the fact that only Jeanette Yannitelli complained of Petitioner's alleged misconduct, Petitioner was deprived of all of his fees, including the fees due on the recoveries of Mr. Yannitelli's four sons and one daughter. Mrs. Yannitelli only represented one-sixth of the total recovery, or $90,000 of the contingency fee, yet the entire fee due Mr. Heller was forfeited.

Secondly, neither client Jeanette Yannitelli nor the other beneficiaries suffered any damages whatsoever as a result of the alleged wrongdoing of Petitioner. To the contrary, the Plaintiff's in this case received the benefit of a total settlement in the amount of $2,700,000, after an appeal, mistrial and dismissal of the Plaintiffs' claims. Clearly, the magnitude of the settlement, which represented the entire insurance policy covering two of the Defendants, forecloses any finding that the alleged

isconduct caused harm to Petitioner's clients.

Moreover, none of the monies, obviously, were the proceeds of any illegal activity. Rather, all of the monies were lawfully obtained after some eighteen (18) years of work in a wrongful death action.

Under the standards enunciated by the *Bajakajian* Court, and under any standards of fairness, the subject forfeiture clearly violated the Excessive Fines Clause of the Eighth Amendment.

Finally, both state courts below failed to engage in any excessive fines analysis or balancing whatsoever, despite Petitioner's timely protest of an excessive fine violation. The failure to even consider that the forfeiture in the amount of $700,000 may be excessive in light of the alleged misconduct, warrants this Court's intervention. *See Alexander v. United States*, 509 U.S. 544, 559 113 S.Ct. 2766, 2776 (1993) (vacating and remanding a forfeiture challenged under the Excessive Fine Clause where the Court of Appeals failed to conduct an excessive fine analysis.)

The New York State Courts' departure from well established and firmly rooted constitutional rights to a criminal jury trial before the imposition of criminal sanctions, due process and protections against excessive fines should, respectfully, be addressed. The state courts' departure from the mandates of the United States

Constitution, this Court's decisional law, and the decisions of the United States Court of Appeals for the Second Circuit, not only permit and encourage the appellate jurisdiction of this Court, but necessitate such corrective action.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Dated: New York, New York
December 10, 1998

Respectfully submitted,

Kenneth Heller, Esq.
Petitioner, Pro Se
291 Broadway - Suite 1407
New York, New York 10007
(212) 962-6085

No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1998

KENNETH HELLER,

Petitioner,

v.

JEANNETTE YANNITELLI, indidually and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,

Respondent.

On Petition for Writ of Certiorari to The Supreme Court of the State of New York, Appellate Division First Department

APPENDIX

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Appendix A – Memorandum of the New York Supreme Court Appellate Division First Department, Decided February 17, 1998 [Pages 1a – 2a]

668 N.Y.S.2d 613

Jeannette YANNITELLI, etc., et al., Plaintiffs-Respondents,

v.

D. YANNITELLI & SONS CONSTRUCTION CORP., et al., Defendants,
Kenneth Heller, Appellant.

Before ROSENBERGER, 1.P., and WILLIAMS, MAZZARELLI and ANDRIAS, JJ.

MEMORANDUM DECISION

Order, Supreme Court, New York County (Beverly Cohen, J.), entered October 3, 1996, which, inter alia, declared any fee for legal services by appellant Kenneth Heller, Esq., plaintiff's former attorney, to be forfeited by reason of violations of the Code of Professional Responsibility, unanimously affirmed, with costs.

[1] The court's denial of recusal was a proper exercise of discretion. We find no merit to appellant's argument that a mandatory statutory basis for disqualification arose in this case (see, Judiciary Law § 14). In the absence of statutory grounds, the decision upon a recusal motion is a discretionary one "within the personal conscience of the court" (People v. Moreno, 70 N.Y.2d 403, 405, 521 N.Y.S.2d 663, 516 N.E.2d 200),

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[Memorandum Decision of the NYSC AD1]

and should not be disturbed "unless the moving party can point to an actual ruling which demonstrates bias", which appellant does not do here (Solow v. Wellner, 157 A.D.2d 459, 549 N.Y.S.2d 384; see also, Scott v. Brooklyn Hosp., 93 A.D.2d 577, 580, 462 N.Y.S.2d 272).

[2] The penalty of forfeiture of the contingent legal fee was not excessive. Contrary to appellant's contention, we perceive no meaningful distinction between this case and cases where the attorney was formally discharged. Where, as here, the attorney has admitted committing numerous violations of the Code of Professional Responsibility in this case over a period of years, we agree that the attorney has, as a result, forfeited any entitlement to fees (see, Pessoni v. Rabkin, 220 A.D.2d 732, 633 N.Y.S.2d 338; Matter of Winston, 214 A.D.2d 677, 625 N.Y.S.2d 927). There were no material disputed factual issues requiring an evidentiary hearing. The undisputed and conceded facts presented to the court over the course of the underlying litigation warranted forfeiture.

We have considered appellant's remaining arguments and find them to be without merit.

Appendix B - Decision of the New York Supreme Court, County of New York, Dated August 16, 1996 [Pages 3a –21a]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TAP PART 30

JEANNETTE YANNITELLI, individually and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,

Plaintiffs,

- against -

D. YANNITELLI & SONS CONSTRUCTION CORP., MID-HUDSON AIRCRAFT REPAIR INC., and JOHN P. DENNIS,

Defendants.

Index No. 4888/80

DECISION

BEVERLY COHEN, J:

Motion Sequences 013, 015, 016, 017, 018, 020, 021 and issues reserved from Motion Seq. 012 and 019 are consolidated for disposition.

BACKGROUND

This case was commenced 18 years ago in 1978, when attorney Kenneth Heller was retained by plaintiff Jeannette Yannitelli to represent her in a wrongful death action against the two defendants. Her husband, Donato Yannitelli had died on June 8, 1978 when the Beechcraft airplane he was piloting crashed. The plane was owned

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by D. Yannitelli Construction Co. ("Construction Co.") and maintained by Mid-Hudson Aircraft Repair Inc. and John P. Dennis ("Mid-Hudson" and "Dennis").

After being approached by Heller at her husband's wake, Mrs. Yannitelli hired him to pursue this wrongful death action. On June 21, 1978, 13 days after the crash, she signed a contingent fee agreement with him. At his behest she signed the retainer agreement as "administratrix of the estate," when, in fact she was not. Albert Yannitelli, who actually received temporary letters of administration in 1979 from the Putnam County Surrogate's Court was joined with her as co-plaintiff when the suit was initiated.

During the next 17 years, as the wrongful death action progressed through the courts to settlement, the relationship between Kenneth Heller and Jeannette Yannitelli grew more complex. No longer solely client and lawyer in a wrongful death action, they allegedly embarked on extensive joint real estate ventures with Heller being both lawyer and co-investor. Their personal relationship grew as well.

Heller became, as Mrs. Yannitelli attests, "My lawyer, my advisor and then my paramour," [Yannitelli Affidavit, sworn to on September 13, 1995, "Mrs. Yannitelli's Affidavit," pp.22-23, paras. 29-30 (motion seq. #12)]. They traveled extensively throughout the world investing in real estate in the United States, in Switzerland, and in the Caribbean. Their love affair continued until 1990, when their personal relationship fell apart during a trip to Brazil. The purpose of the Brazil

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trip was to acquire an orange grove, which Mr. Heller "could use as income for alimony he would have to pay to his wife ... upon their then anticipated divorce." [Mrs. Yannitelli's Affidavit, p.23, para. 32]

Speaking about this time, Mrs. Yannitelli refers to Heller as exerting a "Svengali influence" on her; [Mrs. Yannitelli's Affidavit p.24, para. 36; among other things, compelling her to have her passport reissued in a shortened version of her maiden name "to avoid any conflict with this case." [Id. at p. 24, Para 36.]

Their business relationship continued, albeit racked with recriminations and allegations of wrongdoing from both sides. Dissension then, as now, centered primarily on a series of disputed loans [represented by promissory notes], which Heller alleged he had made to Mrs. Yannitelli both in a personal and business capacity.

Mrs. Yannitelli, while not disclosing to the court any proof of her investment of any funds in these ventures, claims that Mr. Heller "assured" her, that she "had a 50% interest in all of the properties purchased, and that he would always protect me." [Mrs. Yannitelli's Affidavit, p. 22, para. 29]. According to Mrs. Yannitelli's affidavit [Id. pp. 22-23, paras. 29-30], in order to keep track of the amount of money Heller was paying to buy out Mrs. Yannitelli's interests in selected real properties, Heller had Mrs. Yannitelli execute bogus promissory notes in the amounts of the payments he made to her. Mr. Heller counters this story with the claim that these notes secured loans from him to his client and that some of the properties in question were actually owned by third

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parties.

The whereabouts of the notes, themselves, were a matter of controversy; Mrs. Yannitelli avers that in December, 1989, Mr. Heller returned the notes to her and she destroyed them [Mrs. Yannitelli's Affidavit, para. 31, p. 23]. Mr. Heller claims that in 1990 Mrs. Yannitelli pilfered the notes from his office, and adds that a year later she pilfered $22,850 in cash from a briefcase of one of Mr. Heller's other clients (Affirmation of Kenneth Heller, dated February 21, 1996, pp 3-4, and Exhibit 9, Motion Seq. #19).

Heller gradually became his client's adversary rather than her advocate. For example, Mr. Heller accuses his client of spreading malicious falsehoods about him. Mrs. Yannitelli explains that Mr. Heller brought a case of defamation against a woman who accused Mr. Heller of rape and that she learned that the case was being heard before a judge who was Mr. Heller's personal friend. Mrs. Yannitelli states that she told the woman's lawyer of the relationship between Heller and the judge. Mr. Heller claims Mrs. Yannitelli is a liar. He offers as proof a letter written and signed by Mrs. Yannitelli to the judge, in which she wrote that Mr. Heller was "the victim of an emotional war" and that "in a jealous, menopausal, sometimes intoxicated rage" she had made [s]tatements about him "that were without foundation, absolute lies." [Affirmation of Kenneth Heller, dated February 21, 1996, Exhibit 5, Motion Seq. # 19]] Mrs. Yannitelli, in turn, alleges that Heller dictated the letter and forced her to sign it [Affidavit of Yannitelli, sworn to on February 27, 1996, p. 15, para. 41 (Motion Sequence # 20].

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THE MID-HUDSON AIRCRAFT SETTLEMENT

After a lengthy trial which ended in a mistrial in 1992, a settlement of one million dollars, representing the total insurance available to the aircraft maintenance company, was reached with Mid-Hudson and Dennis. A Stipulation of Discontinuance was issued with respect to Mid-Hudson and Dennis in 1992. A check was issued on February 20, 1992.

At a conference before Justice Edward Greenfield, before whom the case was then pending, as to how this settlement was to be distributed, Mr. Heller argued that the Court could and should disregard the retainer agreement and award him a higher fee based on quantum meruit or, in the alternative, if based on the contingent fee agreement, the fee should be computed based on the gross recovery, that is before the deduction of disbursements. (counsel based this on his unique interpretation of EPTL, Sec.5-4.4(2)(b). Mrs. Yannitelli argued that the retainer agreement should be honored and that the fee should be limited to 1/3 the net settlement. The Court rejected Mr. Heller's argument and agreed with Plaintiff Yannitelli that the fee would be set at 1/3 the net recovery.

Mrs. Yannitelli, on her own behalf and unrepresented by other counsel, then questioned a number of the enumerated expenses, specifically secretarial overtime salaries and outside services in the amount of $17,295, long distance telephone calls in the amount of $14,000, messenger service and travel in the

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amount of $3,500, legal and accounting services in the amount of $14,755 and postage. At no point in the transcript of these proceedings is there evidence that Mrs. Yannitelli was advised by Mr. Heller that their interests had become adverse and that she might want to consult new counsel.

Nonetheless, after an off-the-record conference with the Court, Mrs. Yannitelli consented to the disbursements as presented by her attorney, voicing some concern about how long it would take for a decision from the court, if she did not.

The Court stated for the record that Mrs. Yannitelli's agreement:

> eliminates the necessity for receiving further substantiation and inquiry by the Court as to the propriety of the disbursements....[Transcript dated April 21, 1992, p. 34]

By an order of the court dated May 5, 1992, Mr. Heller was awarded $175,772. in disbursements and a fee of $274,743. representing one-third of the net recovery of $824, 228; and Jeannette Yannitelli and her four sons, as distributees, received $549,485.33, the balance of the settlement. Having waived a "Kaiser " distribution in open court, Mrs. Yannitelli and her children agreed that they would all receive equal shares of the money. This was nearly three months after Heller received the check from Mid-Hudson.

In the same month, while this action was still

pending against Construction Co., an application was made by Heller to withdraw as counsel. He also instituted a lawsuit to collect the alleged loans from Mrs. Yannitelli. [See letter of Kenneth Heller to Mrs. Yannitelli, dated May 14, 1992, annexed to Mrs. Yannitelli's Affidavit as Exhibit M, and Affidavit of Yannitelli, sworn to on February 27, 1996, Exhibit 6, (Motion Sequence # 20)] Mr. Heller claims that he agreed, at the urging of Justice Greenfield and Donato Yannitelli, Jr., to stay on as Mrs. Yannitelli's attorney. His condition for continued representation was that Mrs. Yannitelli's share of the settlement be put in escrow to secure payment of the alleged loans. Mr. Heller agreed to withdraw the lawsuit to recover on the notes. Mrs. Yannitelli's part of the settlement was then doled out to her bit by bit by the escrowee , over the ensuing two years.

THE CONSTRUCTION CO. SETTLEMENT

In June, 1995, a settlement of one million, seven hundred thousand dollars ($1,700,000) was reached with Construction Co. by Mr. Heller. A check was issued to Kenneth Heller "as attorney for he estate of Donato Yannitelli." The money was deposited initially in the Bank of New York and then transferred to a money market account in a brokerage house, which Heller felt would yield higher income for the distributees until it was distributed. Mr. Heller justifies this decision, claiming the consent of Mrs. Yannitelli's eldest son. Once more the funds were not distributed in a timely fashion.

In August of 1995, Mrs. Yannitelli complained

about Mr. Heller to the Grievance Committee. In a series of faxes, Mr. Heller threatened to return the settlement check to the insurer for Construction Co., allegedly to protect himself in light of the complaint [Mrs. Yannitelli's Affidavit, Exhibits P, R & T]. It was not until March 1996, through the efforts of Mrs. Yannitelli's new counsel, that Mr. Heller made a partial distribution of the funds under compulsion of the February 29. 1996 order of this court. Even after the order was entered, commencement of a contempt proceeding was required before Mr. Heller would comply.

The final distribution of this settlement is the subject matter of the present plethora of motions.

PRIOR ORDERS

Kenneth Heller's motion to withdraw as plaintiff Yannitelli's attorney was denied on default on February 15, 1996. Nobody appeared on his behalf when the motion was to be heard. (Motion sequence 018)

A Temporary Restraining Order was issued by this court enjoining Dean Witter Reynolds from releasing any part of the 1.7 million dollars of the Construction Co. settlement funds deposited in the money market account by Heller, without court approval.

In an Interim Order, dated February 29, 1996, this Court directed an accounting of the Construction Co. settlement and ordered Heller to distribute $1,113,083.27 to Jeannette Yannitelli. This sum represents two-thirds of the Construction Company settlement, less Mr. Heller's

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requested disbursements, plus income acquired since the settlement was deposited in July 1995. The balance remains in the money market account at Dean Witter Reynolds.

On March 7, 1996, Mr. Heller made an oral motion on the record for me to recuse myself. The motion was denied.

THE PRESENT MOTIONS

Mr. Heller moves in motions 012, 015, 016, 021, and cross-moves in motion 013 for clarification of whether he will be paid pursuant to the retainer agreement or in quantum meruit; to refer this matter to Justice Greenfield who was familiar with the case, and to compel payment or his fee. In Motion 021 Heller asks for sanctions to be imposed on the Plaintiff's incoming attorneys Moses, Singer for frivolous motion practice.

Mrs. Yannitelli cross-moves in Motion 012 and moves in Motion 013 for an order declaring that Mr. Heller forfeited his attorney's fee and directing distribution of the full 1.7 millon dollar settlement reached with Construction Co. to her and her four sons; or, in the alternative, for determination of the reasonable value of Heller's services and expenses, and for distribution of the net amount of the settlement to her and her children. Mr. Heller moves to dismiss the cross-motion. (Motion Seq. 015) Plaintiff also asks the Court to sanction Heller for not distributing the Construction Co. settlement in a timely fashion and for frivolous motion practice (Motion Seq. 017), and to hold

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Mr. Heller in contempt (Motion Seq. 020).

Plaintiff also moves to quash a subpoena served on Albert Yannitelli (Motion Seq. 019).

Mr. Heller moves to withdraw as counsel, to vacate the denial of his motion to withdraw and for a jury trial on the issue of his fee [Motion Seq. No. 18]. Plaintiff cross-moves in Motion Sequence No. 18 for sanctions.

DISCUSSION

The first issue to be decided concerns the basis upon which Heller's fee, if not forfeited, should be awarded.

Contrary to her position in 1992 when the settlement with Mid-Hudson and Dennis was reached, Mrs. Yannitelli and her sons now assert that the retainer agreement is void. However, they are precluded from revoking the agreement. The time to have repudiated the retainer agreement was when the first settlement was reached. The acceptance of the agreement before the Justice then presiding and his subsequent decision enforcing the retainer agreement is the law of this case. Therefore, Mr. Heller would be entitled to recover one-third of the net settlement with the Construction Co. if, by his conduct, he has not forfeited his fee in part or in whole .

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THE DISBURSEMENTS

To compute the net amount of the settlement available for distribution, the disbursements claimed must first be approved by the court and deducted from the gross settlement of $1,700,000. Plaintiff's attorney has presented the court with a list of disbursements totaling $30,982.78. It is well established that "[a]n attorney has the implied authority to incur and is entitled to be reimbursed for such reasonable expenditures as the diligent prosecution or defense of the lawsuit may require." [*Rao, Jr. v. Noferi,.* 50 Misc.2d 60, 61 (Appellate Term, First Dept. 1966); *Badger v. Celler,* 41 App. Div. 599] However disbursements do not include expenditures which are a "necessary part or adjunct of a properly equipped lawyer's office" *[Master of Lessing, 165 M. 706, 708]* "or which are a necessary part of his duties,"[*Matter of Diamond* NYLJ 10/23/92, p.26, col. 6 (Surr. Ct., Westchester Co.)].

The court disallows the following disbursements:

Item 1. in the amount of $11,803.75 is listed as "Approved disbursement by Justice Greenfield deferred until next trial." However, Attorney Heller has offered neither a judicial order in evidence of this approval, nor has he clearly itemized exactly what these disbursements represent. Nor are these disbursements explained on his Accounting of March 26, 1992 [Annexed as Exhibit 1 to the letter of Moses & Singer dated May 7, 1996], where he has listed $11,830.75 (sic) for "overtime and outside services (deferred)". Assuming that this is the item to which he is referring in his present list of disbursements,

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it behooved him to particularize these services and "explain the necessity and circumstances therefor and advise the court as to why the expense should not be considered a traditional part of the normal operating costs of a law office or otherwise provide authority for their inclusion as a reimbursable disbursement." [Matter of Diamond, supra] Because these expenses are not properly itemized or explained the Court has no option but to disallow them.

Item 5. $105.71 for meals is disallowed. *[Matter of Axe,* NYLJ, 12/11/80, p. 14, col. 6, at p. 15, col. 2]

Item 7. $2,865.89 Temporary Overtime Workers and Meals [Id.]

Item 8. $1,251.46 Westlaw Legal Research *[Matter of Farietta,* NYLJ, 11/20/90, p. 22, col. 6 (Surr. Ct., Bx. Co.); *Brown v. State*, 142 M2d 129]

Item 9. $2,650.00 Appellate Division Legal Services, which is claimed as payment for legal services, writing and preparation of an appeal brief. Outside legal services are not a proper disbursement chargeable to this settlement" [See Accounting by Mr. Heller for the period April 1, 1992 to June 19, 1995, annexed as Exhibit 1 to letter of Kenneth Heller, dated April 2, 1996; see also Heller Affidavit, sworn to April 10, 1996 p. 8, para. 17 (Motion sequence 021); *Matter of Diamond,* supra]

Item 10. $106.51 Travel Expense *(Id.; Brown v. State,* supra; *Matter of Zalaznick,* NYLJ, 11/19/75, p. 11, col. 1, aff'd 61 AD2d 772.

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Item 11. $550.00 Telephone and Fax *[Matter of Zalaznick,* supra; *Matter of Diamond;* supra]

Item 12. $192.03 Outside Photocopying *[Matter of Farietta,* supra, *see Matter of Diamond,* supra]

Item 13. $275.00 Photocopying from Office Machine *[Id.]*

Item 14. $24.00 Federal Express [*Matter of Farietta,* supra]

Item 15. $150.00 Postage [*Matter of Zalaznick,* supra]

The remaining disbursements amounting to $10,877.07 are approved and are to be reimbursed to Mr. Heller from the settlement fund.

THE ATTORNEY'S FEE

Mr. Heller has already received disbursements of $175,772 and a fee of $274,742 (for first settlement). The court is denying approval of any further remuneration or fee due to what can only be characterized as egregious conduct of Mr. Heller and his violation of multiple provisions of the New York Code of Professional Responsibility.

To ascertain the fee that an attorney earns, one must look not only at the work that she/he has done for the client, but at the client/attorney relationship itself, and

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the attorney's behavior throughout that relationship. It is well settled that "[A]n attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered." *Matter of Winston v. Rogers & Wells,* 214 AD2d 677; *Brill v. Friends World College,* 133 AD2d 729]

Mr. Heller has projected the blame for the entire breakdown of his relationship with his client onto Mrs. Yannitelli. In the process, he has let his emotions and avarice so cloud his professional judgment that he has violated some of the most essential Disciplinary Rules of the New York Code of Professional Responsibility, a fact which the Court must not ignore in this fee discussion.

The standard of review to which the attorney's behavior is held:

> is not the reasonableness of the individual attorney's belief, but rather whether a 'reasonable attorney, familiar with the Code and its ethical strictures would have notice of what conduct is proscribed.' [*Matter of Holtzman* 78 NY2d 184, 191]

The "punctilio of an honor the most sensitive" *[Meinhard v. Salmon,* 249 NY 458,464] must be the standard.

> The conduct of attorneys is not measured by how close to the edge of thin ice they skate. The measure of an attorney's conduct is not how much clarity can be squeezed out of the strict letter of the law, but how much honor can be poured into the generous spirit of lawyer-client relationships. [Matter of

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Cooperman 83 NY2d 465, 475]

Clearly, Mr. Heller has skated over the edge and fallen in.

As an experienced and reasonable attorney Mr. Heller should have been aware that:

He had violated DR 2-103 (a lawyer shall not solicit professional employment) when he approached Jeannette Yannitelli" at the wake of her husband" and offered his legal assistance;

He had violated DR5-104(a) [Matter of Mayerhoff, 213 AD2d 37 [a lawyer must not enter into a business relationship with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment on the client's behalf)] and DR5-101(a) (except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment ...may be affected by the lawyer's own financial, business, property, or personal interests). He continued making loans and/or payments to Mrs. Yannitelli, who had a right to expect him to exercise professional judgment for her protection, after he no longer considered her interest to come before his own; as evidenced by his calling her a thief, by accusing her of slandering him, and by his laying claim of sole ownership to property in which an ownership dispute had arisen between himself and his client. There can be no clearer conflict interest;

He had violated DR7-101(a)(1) and (3)(a lawyer must not fail to seek the lawful objectives of the client and must not intentionally prejudice or damage the

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client), when he threatened to return the Construction Company settlement to the insurance company [Mrs. Yannitelli's Affidavit, Exhibits P, R&T] and when be insisted Mrs. Yannitelli's share of the Mid-Hudson settlement be put into escrow for repayment of the alleged loans as a condition of continuing to represent her;

He had violated DR 9-102(b)(1) (A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within the State of New York....), when he placed the Construction Company funds in a money market account at a brokerage house.

And most serious of all, he had violated DR9-102(c)(4) (a lawyer must promptly pay... to the client... the funds ... in the possession of the lawyer which the client is entitled to receive) [see *Matter of Sorid,* 189 AD2d 377; and see also *22 NYCRR 603.7 (d)* (settlement must be turned over to client within 15 days)] He did not distribute the settlement funds which he had received in the Mid-Hudson settlement to his client until more than two months after he, as a fiduciary, received then; he did not even attempt to distribute the Construction Company settlement until his client retained another attorney to secure what was rightfully due to the distributees; Heller, in fact, wrote in his letter of June 30, 1995 to his client, whom he accused of owing him money "[B]alance of $126,865.17 must be fully repaid prior to the distribution of any funds which are under my control," referring to the Construction Company settlement [see Exhibit A to the

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Reply Affirmation of Joel David Sharrow, dated November 8, 1995 (Motion Seq. #17)].

In addition, although Mr. Heller was reimbursed for experts' fees which he had "disbursed," there is still at least one expert, Lucius Pitkin, who has written to this Court stating that he has not yet been paid and has had to have his fee reduced to a judgment against Mr. Heller.

Insofar as his behavior has been violative of the Disciplinary Rules of the Code of Professional Responsibility, Mr. Heller is not entitled to a legal fee for any services rendered in obtaining the settlement with the Construction Company.

TRANSFER TO SURROGATE COURT AND FINAL DISTRIBUTION OF FUNDS

At present, $1,113,083.27 has been paid to Jeannette Yannitelli and her sons, out of the escrow account at Dean Witter Reynolds. Of the balance, Kenneth Heller is to pay himself $10,877.07 for his disbursements. Mr. Heller is directed to transfer the remaining funds in that account to Albert Yannitelli, as executor of the Estate of Donato Yannitelli. The case is transferred to the Surrogate's Court of Putnam County for distribution of the fund. Upon proof of payment submitted by Mr. Heller, he is relieved as counsel. The transfer to Surrogate's Court is required to ascertain whether there are any more distributees of the deceased who are entitled to share in the distribution and to distribute the proceeds to the distributees properly.

Appendix B
[Decision of the NYSC, County of New York]

The Last Will and Testament of Donato Yannitelli, which is included in the record, indicates that the deceased had, in addition to his four sons with his wife Jeannette, a daughter, Doneve, born of a previous marriage. If Doneve Yannitelli was living at the time of her father's death, she (or if she is no longer living at the present time, her heirs) would be entitled to share in the proceeds of both settlements. Plaintiff has offered no evidence concerning Doneve.

The motion to approve the settlement is granted. The motions to declare Mr. Heller's fee forfeited and to compel him to deliver the balance of the settlement proceeds to plaintiff are granted to the extent indicated in this opinion. The motion for contempt is denied as the misconduct charged has been dealt with in the forfeiture motion. The motion to quash the subpoena is granted. Mr. Heller's request for sanctions is denied. Plaintiff's request for sanctions is denied in light of the decision to deny Mr. Heller a fee. The motions by Mr. Heller for a hearing and to refer the motions to Justice Greenfield are denied.

The remaining contentions of the parties have been considered by the court and have been found to be without merit.

Settle order. The attorneys for Mrs. Yannitelli are directed to serve a copy of the order to be settled herein on the clerk of the court to effectuate transfer to the Surrogate's Court. Upon service upon the clerk of that order, the clerk is directed to transfer the file to the Surrogate's Court, Putnam County.

Appendix B
[Decision of the NYSC, County of New York]

Dated: August 16, 1996.

_____

J.S.C.

N.B. The court acknowledges the efforts of Bernadine Jacobs, Esq., *pro bono* attorney, in the preparation of this decision.

Appendix C - Order of the New York Supreme Court, County of New York, Dated October 1, 1996 [Pages 22a – 31a]

PRESENT: Honorable Beverly S. Cohen,
J.S.C.

---X

JEANNETTE YANNITELLI, individually and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli, Deceased,

Plaintiffs,

- against -

D. YANNITELLI & SONS CONSTRUCTION CORP., MID-HUDSON AIRCRAFT REPAIR INC., and JOHN P. DENNIS,

Defendants.

Index No. 4888/80

ORDER

---X

UPON reading and filing the Notice of Motion and supporting Affirmation (with exhibits) of Kenneth Heller, Esq., both dated September 22, 1995, to approve the settlement of this wrongful death action, to withhold $250,000 in escrow, to fix Kenneth Heller's fee at one-third of the proceeds and to approve distribution of the proceeds, and to withdraw as plaintiff Jeannette Yannitelli's attorney; the Notice of Cross-motion dated September 15, 1995, of Jeannette Yannitelli, for an accounting of the settlement proceeds, to declare the retainer agreement between Jeannette Yannitelli and

Appendix C
[Order of the NYSC, County of New York]

Kenneth Heller void or unenforceable, and/or for forfeiture of attorneys fees and for payment of the full settlement proceeds to Mrs. Yannitelli and her four sons without any deduction for attorneys fees, to transfer the matter to Surrogate's Court in Putnam County, and to discharge attorney Heller upon such full payment and accounting, with supporting Affidavits of Jeannette Yannitelli sworn to September 13, 1995 (with exhibits), Donato Yannitelli III sworn to September 13, 1995, Anthony Yannitelli sworn to September 13, 1995, Tino Yannitelli sworn to September 13, 1995, and Vincent Yannitelli sworn to September 12, 1995, and the Affirmation of Joel David Sharrow dated September 14, 1995 (with exhibit); the Affidavit of Dennis Doody sworn to September 12, 1995; the Order to Show Cause entered September 20, 1995, and supporting Affidavit of Jeannette Yannitelli, sworn to September 19, 1995, seeking a distribution of the full amount of the settlement proceeds without deduction or off-set and otherwise restraining the removal or transfer of funds out of Account no. A487-201906-007 at Dean Witter Reynolds, Inc. (in the name of "Kenneth Heller PC Special Account"); the Notice of Cross-motion with supporting Affirmation (with exhibits) of Kenneth Heller, both dated September 22, 1995, to modify the April 21, 1992 order of Hon. Edward Greenfield, J , in this case, for payment of attorneys' fees, to withhold a sum in escrow, to retain the settlement proceeds and to prohibit transfer of this action to Surrogate's Court, Putnam County; the Opposition and Reply Affidavits of Jeannette Yannitelli (with exhibit) and Donato Yannitelli III, both sworn to September 26, 1995; the Reply Affirmation of Saul Rudes, Esq., dated October 6, 1995, and the Reply

Appendix C
[Order of the NYSC, County of New York]

Affidavit of Kenneth Heller, sworn to October 6, 1995 (with exhibits); the Affidavit of Jeannette Yannitelli sworn to October 6, 1995, the Affidavit of Stephen X. Wright, Esq., sworn to October 9, 1996, the Affidavit of Joel Sharrow, sworn to October 10, 1995 (with exhibits), and the Opposition Affirmation of Kenneth Heller dated October 10, 1995; the Notice of Motion and supporting Affirmation of Kenneth Heller (with exhibits), both dated October 9, 1995, to dismiss Jeannette Yannitelli's cross-motion and to fix Kenneth Heller's fees; the Reply and Opposition Affidavit of Kenneth Heller sworn to October 11, 1995 (with exhibits); the Affidavit of Michael Tighe sworn to October 12, 1995, and the Affirmation of Joel Sharrow, dated October 12, 1995 (with exhibits); the October 13, 1995 letter of Moses & Singer LLP to the Court with enclosed exhibit, the October 16, 1995 letter of Saul Rudes, Esq. to the Court, the Supplemental Affidavit in Opposition of Kenneth Heller, sworn to October 17, 1995, the Opposition Affirmation of Joel Sharrow, dated October 18, 1995 (with exhibits), the Reply Affidavit of Albert Yannitelli sworn to October 19, 1995 (with exhibit) and the Reply Affidavit of Kenneth Heller sworn to October 24, 1995; the Notice of Motion dated October 9, 1995, and supporting Affirmation of Kenneth Heller, dated October 30, 1995 (with exhibits), to refer the May 5, 1992 Order of Hon. Edward Greeenfield, J., to clarify and interpret, the Order to Show Cause entered November 3, 1995, with supporting Affidavit of David Picker, sworn to November 3, 1995 (with exhibits), and opposition and Supporting Affidavit of Jeannette Yannitelli sworn to November 2, 1995, seeking sanctions against Kenneth Heller and enjoining further motion practice by him, the Reply

Appendix C
[Order of the NYSC, County of New York]

Affirmation and Affirmation in Opposition of Kenneth Heller dated November 6, 1995, the Affidavit of Saul Rudes, Esq., sworn to November 7, 1995, the Reply Affirmation of Joel Sharrow, dated November 8, 1995 (with exhibits), and the Supplemental Affirmation of Kenneth Heller, dated November 17, 1995; the December 26, 1995 letter of Moses & Singer LLP to the Court, with enclosed exhibits, the Affirmation of Kenneth Heller dated December 26, 1995, the December 27, 1995 letter of Saul Rudes, Esq. to the Court with enclosed exhibits, the January 3, 1996 letter of Saul Rudes, Esq., to the Court, with enclosed exhibits, the January 5, 1996 letter of Moses & Singer LLP to the Court with enclosed exhibits, the January 11, 1995 letter from Moses & Singer LLP to the Court, with enclosed exhibit, the Affidavit of Kenneth Heller, sworn to January 30, 1996 (with exhibits), and the February 2, 1996 letter of Saul Rudes, Esq., to the Court, with enclosed exhibits; the Order to Show Cause entered February 1, 1996, with supporting Affirmation of Kenneth Heller, dated January 29, 1996 (with exhibits), to withdraw as plaintiff's attorney, the Notice of Cross-motion of Jeannette Yannitelli, dated February 12, 1996, for separate sanctions against Kenneth Heller and to enjoin further motion practice, with two supporting and opposition Affidavits of Jeannette Yannitelli both sworn to February 10, 1996 (one with exhibits), and supporting and opposition Affidavits of Joel Sharrow sworn to February 12, 1996 (with exhibits), of Albert Yannitelli sworn to February 10, 1996, of Donato Yannitelli III, sworn to February 10, 1996, of Edward Marion, Esq., sworn to February 7, 1996 (with exhibit), of Kerwyn Welch, sworn to February 9, 1996, of Abbey C. A. Hartwell, sworn to February 9, 1996, of

Appendix C
[Order of the NYSC, County of New York]

Melitta A. Boulanger, sworn to February 9, 1996, and of David Picker sworn to February 12, 1996 (with exhibit), the February 13, 1996 letter of Moses & Singer LLP to the Court, with enclosed exhibit, the Affirmation of Kenneth Heller dated February 21, 1996 (with exhibits), and the Supplemental Affidavit of David Picker sworn to February 27, 1996; the Notice of Motion of Kenneth Heller with supporting Affirmation of Kenneth Heller (with exhibits), both dated February 21, 1996, for a hearing, to vacate decision, and/or to refer to Hon. Edward Greeenfield, J., the Opposition Affidavit of Jeannette Yannitelli sworn to February 27, 1996 (with exhibits), the Affidavit of Robert Dauhn sworn to February 24, 1996, the Affidavit of Donato Yannitelli III sworn to February 27, 1996, and the Affidavit in Opposition and in support of Cross-motion for Sanctions of David Picker sworn to February 28, 1996 (with exhibits); the Order to Show Cause entered February 22, 1996, with supporting Affidavits of David Picker sworn to February 22, 1996 (with exhibit), and of Albert Yannitelli sworn to February 21, 1996 (with exhibits), to quash a subpoena served on Albert Yannitelli, stay the effect of any subpoenas served and enjoin service of further subpoenas, the Revised Affidavit of Albert Yannitelli sworn to February 27, 1996, the Affirmation in Response of Kenneth Heller dated February 28, 1996, the Reply Affidavit of Albert Yannitelli sworn to February 28, 1996 (with exhibits), and Reply Affirmation of Joel Sharrow, dated February 29, 1996 (with exhibits); the Order to Show Cause entered March 5, 1996, with supporting Affidavits of David Picker sworn to March 5, 1996 (with exhibits) and Jeannette Yannitelli sworn to March 5, 1996 (with exhibits), to hold Kenneth Heller in

contempt of the Court's February 29, 1996 Interim Order, the Affidavit in Opposition of Kenneth Heller sworn to March 7, 1996; the undated unverified Statement of Accounting by Kenneth Heller filed on or about March 11, 1996, the Verified Objections thereto of the Yannitelli family dated March 13, 1996, the Affidavit of Kenneth Heller in Response to Objections to Accounting, sworn to March 27, 1996, the April 2, 1996 letter of Moses & Singer LLP to the Court with enclosed exhibits, the April 2, 1996 letter of Kenneth Heller to the Court with enclosed exhibits (including itemization of disbursements); the Notice of Motion of Kenneth Heller dated March 28, 1996, to impose sanctions, with supporting Affidavit of Kenneth Heller sworn to March 28, 1996 (with exhibits), the Affidavit in Opposition of David Picker sworn to April 4, 1996 (with exhibits), the Opposition Affidavit of Donato Yannitelli III sworn to April 4, 1996, the Affidavit in Reply of Kenneth Heller sworn to April 10, 1996 (with exhibit), as corrected by letter of Kenneth Heller to the Court dated April 2, 1996 [sic - really, April 12, 1996], the Supplemental Affidavit of Jeannette Yannitelli sworn to April 16, 1996, the Supplemental Affidavit of Donato Yannitelli III sworn to April 25, 1996, the Supplemental Affidavit of David Picker sworn to April 24, 1996 (with exhibit), the letter of Moses & Singer LLP to the Court dated May 7, 1996 (with enclosed exhibits), the Affidavit of Thea Geotas sworn to May 13, 1996, the letter of Kenneth Heller to the Court dated May 15, 1996, the letter of Moses & Singer LLP to the Court dated May 20, 1996 , the letter of Kenneth Heller to the Court dated May 24, 1996, and the letter of Kenneth Heller to the Court dated June 12, 1996; and the letter of Lucius Pitkin to the Court;

Appendix C
[Order of the NYSC, County of New York]

AND the Court having heard oral argument on October 11, 1995, on October 12, 1995, on November 16, 1995, on February 15, 1996, on February 29, 1996, on March 5, 1996, on March 7, 1996, on March 8, 1996, and on March 11, 1996, and having reviewed the transcripts of said arguments;

AND the Court having rendered and entered its Interim Order herein dated February 29, 1996, directing an accounting of the settlement and proceeds thereof reached in 1995, and ordering Kenneth Heller to distribute $1,113,083.27 of the settlement proceeds to Jeannette Yannitelli and directing that the balance and all interest and dividends accrued and accruing thereon remain in escrow at Dean Witter Reynolds, Inc.;

AND the Court having rendered its written Decision herein dated August 16, 1996, disallowing certain disbursements claimed by Kenneth Heller and finding that Kenneth Heller has forfeited his right to a fee in this case by reason of his numerous violations of the Code of Professional Responsibility as specified therein, and otherwise disposing of the foregoing motions in accordance therewith,

NOW, upon all of the foregoing and upon motion of Moses & Singer LLP, attorneys for plaintiff Jeannette Yannitelli, it is hereby

ORDERED, that the motion to approve the settlement is GRANTED and the settlement is hereby APPROVED; and it is further

Appendix C
[Order of the NYSC, County of New York]

ORDERED, that Items l, 5, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of Kenneth Heller's claimed disbursements are DISALLOWED; and it is further

ORDERED, that the remaining disbursements in the amount of $10,877.07 are APPROVED, and Kenneth Heller shall immediately pay to himself out of the settlement proceeds now in escrow only the sum of $10,877.07 as full reimbursement for his disbursements in this action; and it is further

ORDERED, that Jeannette Yannitelli's motion to declare Kenneth Heller's fee forfeited is GRANTED, to the extent that Kenneth Heller may recover only his approved disbursements in the amount of $10,877.07 as ordered hereinabove and he has otherwise FORFEITED any further fee for legal services by reason of his violations of the Code of Professional Responsibility including DR 2-103, DR 5-104(a), DR 5-101(a), DR 7-101(a)(1) and (3), DR 9-102(b)(1), and DR 9-102(c)(4); and it is further

ORDERED, that upon service upon Kenneth Heller of a copy of this Order with Notice of Entry, he shall IMMEDIATELY TRANSFER to Albert Yannitelli as Executor of the Estate of Donato Yannitelli Jr., all remaining funds in the Dean Witter Reynolds escrow account, including all interest, dividends and other earnings accrued and earned thereon (less the $10,877.07 to be paid to Kenneth Heller as reimbursement for approved disbursements); and it is further

Appendix C
[Order of the NYSC, County of New York]

ORDERED, that upon proof of payment of the foregoing amounts submitted by Kenneth Heller to this Court, he is RELIEVED as counsel to Jeannette Yannitelli; and it is further

ORDERED, that the motion of Albert Yannitelli to quash the subpoena served upon him is GRANTED; and it is further

ORDERED, Kenneth Heller's motions for a hearing and his motion to refer this matter to Hon. Edward Greenfield, J., are DENIED; and it is further

ORDERED, that Kenneth Heller's motion for sanctions is DENIED; and it is further

ORDERED, that the motion of Jeannette Yannitelli to declare invalid the retainer agreement, dated June 21, 1978, between her and Kenneth Heller, is DENIED; and it is further

ORDERED, that Jeannette Yannitelli's motions for sanctions, for an injunction against further motion practice by Kenneth Heller, and to hold Kenneth Heller in contempt, are DENIED as sufficiently resolved by the forfeiture of Kenneth Heller's fee as ordered herein; and it is further

ORDERED, that this case is TRANSFERRED to the Surrogate's Court of Putnam County for distribution of the proceeds to the distributees properly in accordance with the Surrogate's Court's findings and applicable law; and it is further

Appendix C
[Order of the NYSC, County of New York]

ORDERED, that upon service by the attorneys for Jeannette Yannitelli of this Order with notice of entry upon the Clerk of this Court, the Clerk is DIRECTED TO and he SHALL immediately TRANSFER the file of this action to the Surrogate's Court of Putnam county.

ENTER:

_____

J.S.C.

Appendix D – Decision on Motion to the Court of Appeals, Dated July 9, 1998

92 N.Y.2d 875, 700 N.E.2d 317,
677 N.Y.S.2d 777

Jeannette YANNITELLI, Respondent,
Albert J. Yannitelli, etc., Plaintiff,

v.

D. YANNITELLI & SONS CORP., et al.,
Defendants.
Kenneth Heller, Appellant.

**317 Reported below: 247 A.D.2d --,
--N.Y.S.2d --.

***778 Motion, insofar as it seeks leave to appeal from the order of Supreme Court entered October 3, 1996, dismissed upon the ground that it does not lie (see, NY Const, art VI, § 3[b]; CPLR 5602); motion, insofar as it seeks leave to appeal from the Appellate Division order denying appellant's motion for reargument or renewal or, in the alternative, leave to appeal to the Court of Appeals, dismissed upon the ground that that order does not finally determine the action within the meaning of the Constitution; motion for leave to appeal, etc., otherwise denied.

Appendix E – Decision on Motion to the Court of Appeals, Dated September 15, 1998

Jeannette Yannitelli, Respondents,
Albert J. Yannitelli, & c., Plaintiff,

v.

D. Yannitelli & Sons Corp., et al., Defendants.
Kenneth Heller, Appellant.

Mo. No. 963.

Motion for reargument of motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

Appendix F - Affirmation of K. Heller, Dated February 21, 1996 [Pages 34a – 38a]

AFFIRMATION OF K. HELLER DATED 2-21-96 IN SUPPORT OF MOTION FOR HEARING [1368-1437]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

X

JEANNETTE YANNITELLI, individually and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,	:	Index No. 4888/80
	:	Assigned to **J. BEVERLY S. COHEN**
Plaintiffs,	:	IAS Part 30
- against -	:	**AFFIRMATION IN SUPPORT OF MOTION**
D. YANNITELLI & SONS CONSTRUCTION CORP., MID-HUDSON AIRCRAFT REPAIR INC., and JOHN P. DENNIS,	:	**FOR A HEARING UNDER CPLR 2218**
	:	**AND TO VACATE THE COURT'S DENIAL TO**
Defendants,	:	**WITHDRAW AND IN OPPOSITION TO THE MOTION FOR SANCTIONS**

X

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

SOME OF THE ISSUES OF FACT

There are substantial issues of fact that must be determined by hearing or Jury Trial before the court can rule on any motion herein. Some of these issues of fact are as follows:

Appendix F
[Affirmation of K. Heller]

1. Did Mrs. Yannitelli retain Mr. Heller and sign a retainer on June 21, 1978?

   A: Mr. Heller says Yes (see copy of retainer, Exhibit 7), Mrs. Yannitelli says No.

2. Was this retainer intended to include the action against D. Yannitelli & Sons?

   A: Mr. Heller says Yes, Mrs. Yannitelli says No.

3. Did Mrs. Yannitelli affirm the validity of the retainer before Justice Greenfield.

   A: Kenneth Heller says Yes, Mrs. Yannitelli says No.

4. Did Kenneth Heller request Quantum Meruit from Justice Greenfield?

   A: Kenneth Heller says Yes, Mrs. Yannitelli says No.

5. Did Justice Greenfield deny Quantum Meruit payment to Kenneth Heller and if he denied same, does Kenneth Heller have a right to demand Quantum Meruit here?

   A: Mr. Heller says Yes, Mrs. Yannitelli says No.

6. Did Mrs. Yannitelli over the years from 1978 on,

Appendix F
[Affirmation of K. Heller]

execute a series of promissory notes for which she received the money.

A: Kenneth Heller says Yes, Mrs. Yannitelli says she never executed any notes.

7. Did Mrs. Yannitelli execute a note in 1995 for $10,000 and repay only $5,000 of same.

A: Kenneth Heller says Yes, Mrs. Yannitelli says she never executed any notes.

8. Did Mrs. Yannitelli pilfer the notes from Kenneth Heller's office on March 13, 1990?

A: Kenneth Heller says Yes, Mrs. Yannitelli says No.

9. Did Mrs. Yannitelli steal $22,850 from Mr. & Mrs. Pires' home in Seminole, Florida on April 13, 1991?

A: Kenneth Heller says Yes, Mrs. Yannitelli had opportunity to respond.

10. Did Kenneth Heller request of Justice Greenfield that he be relieved in representation of Mrs. Yannitelli in 1990?

A: Kenneth Heller says Yes, Mrs. Yannitelli says No.

11. In May, 1992 was Kenneth Heller granted permission by Justice Greenfield to be conditionally relieved at the conclusion of the entire case?

Appendix F
[Affirmation of K. Heller]

A: Kenneth Heller says Yes, Mrs. Yannitelli says No.

12. Did Kenneth Heller bring on a motion in May, 1992 to be relieved as counsel?

A: Kenneth Heller says Yes.

13. Did Mrs. Yannitelli execute a series of notes in 1991 to replace the stolen notes?

A: Kenneth Heller says Yes, Mrs. Yannitelli says No.

14. Was motion to be relieved withdrawn in 1992 upon Mrs. Yannitelli depositing in escrow a sum of money that she received to guaranty payment by her of promissory notes?

A: Kenneth Heller says Yes, Mrs. Yannitelli says No.

15. Did Mrs. Yannitelli in 1994 while Mr. Heller was still her attorney seek out adversaries who she knew were in litigation with Mr. Heller and deliver false and defamatory statements accusing Mr. Heller and a Justice of the Supreme Court of wrong doing?

A: Mr. Heller says Yes. See Mrs. Yannitelli's letter of retraction dated October 14, 1994. (Exhibit 5)

16. Did Mrs. Yannitelli sign a letter confessing to the fact

Appendix F
[Affirmation of K. Heller]

that she brought false information and was suffering from jealous, menopausal, sometimes intoxicated rage?

A: Kenneth Heller says Jeannette Yannitelli's letter of October 13, 1994 (Exhibit 5) proves that. Mrs. Yannitelli says No.

17. Is Mrs. Yannitelli a jealous, vengeful person?

A: Kenneth Heller says Yes.

18. Did Kenneth Heller recover $1,700,000 for Mrs. Yannitelli and her family and did they accept this amount?

A: Kenneth Heller says Yes, see releases (Exhibit 6), Mrs. Yannitelli admits to that.

Under this section there must be a trial of all of these issues, and I am seeking a Jury Trial to determine them.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Appendix G - Affidavit of Zilliah Lawrence, Dated September 15, 1995 [Pages 39 – 41a]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
DEPARTMENTAL DISCIPLINARY COMMITTEE

X

: Docket No. 95/2290

In re :

Complaint of JEANETTE YANNITELLI **AFFIDAVIT**

:

X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

I, ZILLAH LAWRENCE, being duly sworn, deposes and says:

I am not a party to this action, am over 18 years of age and reside in the County of New York.

One evening, in or about 1982 or 1983, when Mr. Heller's office was located at 11 Park Place, New York, New York, I was engaged to do some part-time work when, around 8:00-8:30 p.m., Mrs. Yannitelli arrived at the office and immediately walked into Mr. Heller's office. In a matter of a minute, his light fuse blew. Of course, Mr. Heller hurried out to locate the fuse box in the hallway to turn on the fuse at which time I heard Mrs. Yannitelli rummaging through Mr. Heller's desk drawers one by one. On that occasion, I did not get up to see exactly what was transpiring.

On Wednesday, March 14, 1990, I was employed

Appendix G
[Affidavit of Zilliah Lawrence]

by Mr. Heller who was on a trip to Brazil. Sometime around noon, Mrs. Yannitelli came into the office at 335 Broadway. A little while later, I was curious as to what she was up to and I got up from my desk to observe her. I saw that she was standing next to the bookkeeper's desk and that she was depositing a stack of green promissory notes into her purse which was open in front of her. I then turned to Attorney Susan Harmon and told her what I witnessed and requested that she demand of Mrs. Yannitelli that she return Mr. Heller's property which she was pilfering from his office, but Mrs. Harmon declined to do so. I then told her that Mr. Heller should be notified of the incident. Later, when Mr. Heller called from Brazil, I apprised him of what had taken place.

Later that week when Mr. Heller returned from Brazil, we searched for these promissory notes, including the bookkeeper's desk where they were usually kept, and confirmed that they were missing. To my knowledge, these promissory notes had been made payable to Mr. Heller by Mrs. Yannitelli for loans of money which she requested for various reasons from Mr. Heller over a period of ten years or more. When he loaned her the monies, he had her execute promissory notes which reflected the amounts due, and which I understood were to be paid upon termination of her claim.

Appendix G
[Affidavit of Zilliah Lawrence]

Thereafter, Mr. Heller made requests to Mrs. Yannitelli to return the notes. They were never returned. I later learned that she claimed she had burned them.

_____
Zillah Lawrence

Sworn to before me this
15th day of September, 1995

_____
Notary Public

GEORGE WILLIAM SEMOS
NOTARY PUBLIC - STATE OF NEW YORK
REGIS NO: 02SE4623541
QUAL. IN NASSAU COUNTY
COMMISSION EXPIRES 12/31/95

Appendix H - Affirmation for Valeria Calloway [Pages 42a – 44a]

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

JEANNETTE YANNITELLI, individually and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,

Plaintiffs,

- against -

D. YANNITELLI & SONS CONSTRUCTION CORP., MID-HUDSON AIRCRAFT REPAIR INC., and JOHN P. DENNIS,

Defendants,

Index No. 4888/80
217 N

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO REARGUE AND FOR LEAVE TO TO APPEAL TO THE COURT OF APPEALS

KENNETH HELLER,

Appellant.

VALERIA CALLOWAY, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following under the penalty of perjury:

1. I am the attorney for outgoing attorney, appellant Kenneth Heller, herein and I am fully familiar with the facts, circumstances, and prior proceedings had herein.

Appendix H
Affirmation for Valeria Calloway

2. This affirmation is submitted in support of the instant motion of appellant, Heller to reargue based upon the following grounds:

a. leave to renew and reargue upon the grounds that this court overlooked, misapprehended or misunderstood all questions of fact and law in affirming the lower court's decision declaring that appellant, Kenneth Heller, forfeit his legal fees for services rendered;

3. renewal should be granted because complete forfeiture of Appellant Heller's fee was excessive;

4. there are two new monumental recusal issues of statewide importance which will be elucidated in the succeeding points to this motion:

a. that the lower court violated Judicial Law §14 in that she had a financial interest in the outcome of the motion;

b. that the lower court *sua sponte* and blatantly made statements which exhibited personal bias and prejudice;

5. an evidentiary hearing should have been held because of the numerous factual issues;

6. an undertaking should be posted by the Yannitelli family for the sum of $1,200,000 plus interest because, if there is a reversal by this Court or any other

Appendix H
Affirmation for Valeria Calloway

court, neither the attorney nor anyone else can guarantee the return of the funds.

ALTERNATIVELY,

7. Leave is sought to the Court of appeals because there are two new monumental recusal issues of statewide importance which had been earlier elucidated because:

(a) this Court overlooked the fact that the lower court violated Judicial Law §14;

(b) that Justice Beverly Cohen exhibited personal bias and prejudice, and attempted to intimidate a political protagonist using her position of power to threaten or extort from him withdrawal of a candidate against her.

8. leave is further sought pursuant to CPLR §5602(a)(i)(ii), and (b)(ii); and

9. granting such other, further and different relief as this Court deems just and proper.

(2)

Supreme Court, U.S.
FILED
JAN 29 1999
CLERK

No. 98-987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH HELLER,

Petitioner,

vs.

JEANNETTE YANNITELLI, individually, and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

DAVID M. RABINOWITZ
Counsel of Record
MOSES & SINGER LLP
Attorneys for Respondents Jeannette Yannitelli (and her four non-party distributee-beneficiary sons)
1301 Avenue of the Americas
New York, New York 10019
(212) 554-7800

Of Counsel:
JOEL DAVID SHARROW
ARTHUR F. ABELMAN

150921

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

4988

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should certiorari be denied where the issues Petitioner seeks to raise were not ruled upon nor even raised in the highest state court which passed on this case?

2. Does federal due process require an evidentiary hearing before a court may declare that an attorney has forfeited entitlement to additional legal fees where the undisputed documentary and the uncontested testimonial evidence conclusively establish the attorney's multiple violations of the New York Code of Professional Responsibility?

3. Does federal due process permit a state court to summarily determine the issue that an attorney has forfeited entitlement to additional legal fees due to his admitted unethical misconduct, where the attorney had notice of the issue presented and the facts on which it was based, as well as the opportunity but chose not to contest that issue or the relevant material facts?

4. Does summary civil forfeiture of entitlement to additional legal fees by an attorney who indisputably commits multiple violations of a state's Code of Professional Responsibility violate the Eighth Amendment?

5. Does federal due process require a judge to recuse herself because a party makes it known that he will support another person for her judicial office in the next election where New York State law does not require such recusal?

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STATEMENT OF THE CASE[1]

This simple fee dispute between attorney and clients was resolved under well-settled state law, predicated upon uncontested findings of documented facts. The decision below declared that the Petitioner lost his entitlement to any additional fee, based upon undisputed facts consisting of the Petitioner's own writings and his sworn court submissions (R. 1056, 703, 705, 707, 1525; 549, 553; 787, 786) and undisputed actions and inactions conclusively establishing Petitioner's unethical misconduct. Thus, there is and can be no dispute as to what Petitioner said, or improperly did or did not do.

Petitioner failed to raise and preserve any U.S. Constitutional or other federal law issue in the trial court (the Individual Assignment System Motion Part of the New York Supreme Court), which held that Petitioner forfeited any right to any additional fee, or on his appeal to the Appellate Division which unanimously affirmed (P. App., B and C, A). Petitioner does not and did not even claim that the decision below conflicts with any apposite federal cases.

Petitioner raised for the first time the issues of *state* constitutional due process, only, and of a "harm v. penalty" analysis, on his motion in the New York Court of Appeals seeking a discretionary appeal. The New York Court of Appeals denied both Petitioner's motion for leave to appeal, and his motion to renew and/or reargue such denial, without any reference to the newly raised issues (P. App., D, E). Thus, the state courts never passed on any of the myriad issues which Petitioner belatedly seeks to raise in this Court.[2]

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1. Items designated ("R.") refer to the Record on Appeal; items designated ("P. App.") refer to Petitioner's Appendix; items designated ("R. App.") refer to Respondents' Appendix.

2. In New York, a party may not raise for the first time on appeal constitutional or other issues not presented to the trial court. *Lichtman*

(Cont'd)

Consequently, there are no genuine federal questions involved here or properly developed below and preserved for appellate review, nor is there any conflict between the result below and any applicable federal cases. We respectfully submit that this Court does not have jurisdiction over the issues now sought to be raised by Petitioner. In any event, this Court should not exercise its discretion to grant certiorari to review these newly asserted claims.

A. The Facts

This matter arises out of a statutory special proceeding under New York's Estates, Powers & Trusts Law (the "EPTL") § 5-4.6, pursuant to which a court exercises its discretion to fix an attorney's fee. It involves nothing more than a denial of an attorney's claim for additional counsel fees due to the attorney's admitted multiple violations of the New York Code of Professional Responsibility. Contrary to Petitioner's assertions, this is not a plenary action in which the state court imposed sanctions or a penalty or a fine.

The primary issue in this proceeding, stemming from final settlement of an underlying 17-year-old wrongful death action (R. 103, 105), was whether Respondents Jeannette Yannitelli (and her four non-party statutory distributee-beneficiary sons, R. 623-625, 679, 681; 1597; 1666-1670)[3] were entitled to an

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(Cont'd)
v. Grossbard, 73 N.Y. 2d 792, 794 (1988), *reh. den.*, 73 N.Y. 2d 912 (1989); *Melahn v Hearn*, 60 N.Y. 2d 944, 945 (1983); and, a movant is not entitled to raise new issues in reply papers. *Azzopardi v. American Blower*, 192 A.D. 2d 453 (1st Dep't 1993); *O'Sullivan v. O'Sullivan*, 206 A.D. 2d 957 (4th Dep't 1994). The rule is the same in federal court. *E.g.*, *Francis S. v. Stone*, 995 F. Supp. 368 (S.D.N.Y. 1998).

3. Petitioner refers to Ms. Doneve Booth, the decedent's daughter from a prior marriage, as a possible additional distributee-beneficiary. (Cont'd)

attorney who complied with and did not violate the Disciplinary Rules and the Ethical Considerations of the New York Code of Professional Responsibility (Judiciary Law, 29 McKinney's Cons. L. of New York), New York's EPTL and the contingency fee contract rules of the Supreme Court of the State of New York, Appellate Division, First Department (*see* 22 NYCRR § 603.7, New York Rules of Court).[4]

It is undisputed that Petitioner first obtained employment as Respondent Jeannette Yannitelli's attorney when he introduced himself to and solicited Mrs. Yannitelli at her husband's wake (R. 579), a clear violation of DR 2-103. During the long years of his representation of Mrs. Yannitelli, Petitioner entered into one or more business relationships with Mrs. Yannitelli, either as her real estate partner (R. 587-588), allegedly having a joint interest with Mrs. Yannitelli in a sailing vessel, *see Yannitelli and Heller v. Navieras de Puerto Rico*, 103 F.R.D. 413 (S.D.N.Y. 1984), or as her alleged creditor (R.

(Cont'd)
The issue of her interest, if any, has nothing to do with the instant fee dispute and is not before this Court because no state court has yet ruled upon that issue which is to be resolved in a proceeding to be commenced in the Surrogate Court of the State of New York, Putnam County. Petitioner never raised this issue in the state courts until his motion in the New York Court of Appeals for leave to appeal; and, while he then claimed — for the first time — to have represented Ms. Doneve Booth's as yet undetermined interests, if any, Petitioner made no effort at any time in any of the proceedings below "to protect" whatever interest Ms. Booth allegedly may have.

4. Named co-plaintiff Albert Yannitelli, as Temporary Administrator of the Estate of Donato Yannitelli, was removed as a party some time prior to 1992 (R. 633, lines 14-21; 575-576). Defendants Mid-Hudson Aircraft Repairs, Inc. and John P. Dennis settled out in 1992 (R. 630-631; 679); the remaining defendant D. Yannitelli & Sons Construction Corp. settled in 1995 (R. 777, 555-557).

873-881) or her debtor (R. 1173) — or all four — resulting in a clear and undisputed violation of DR 5-104(a). *Matter of Mayerhoff*, 213 A.D. 2d 37 (2d Dep't 1995) and DR 5-101(a). While her attorney, Petitioner called Mrs. Yannitelli a thief and he also defamed her sons (R. 1370, 1374, 1788; 1402), a violation of DR 4-101(B) and EC 5-1 (an attorney should not speak ill of a client).[5]

In 1992, defendants Mid-Hudson and John P. Dennis offered to settle for $1,000,000, the maximum coverage of their insurance (R. 679). After Petitioner failed to obtain a jury verdict in the underlying wrongful death action (R. 582; 695), such settlement with Mid-Hudson and Dennis was effectuated (R. 630-631; 679). The trial court thereafter awarded to Petitioner $175,772.00 for unproved disbursements, and 1/3 of the balance, *to wit*: $274,742.00, pursuant to his contingency fee agreement (R. 580, 107), for *all* of his services and expenses to that date (679-681). Thus, Petitioner received $450,514.67, almost 50% of the 1992 settlement.

It is undisputed that the remaining portion of the 1992 settlement, which was immediately to have been paid to Mrs. Yannitelli and her sons (R. 681), instead was removed from New York by Petitioner and deposited in a bank in Cresskill, New Jersey (R. 584), in violation of DR 9-102(b) (client funds must be deposited in a bank in New York State); *see also Leon v. Martinez*, 84 N.Y. 2d 83, 90 (1994) (an attorney must promptly notify client of receipt of and pay over to client monies

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5. During the appellate process and while Mrs. Yannitelli's attorney of record below, Petitioner also unsuccessfully sued her for defamation and tortious interference with contract. That action was dismissed pursuant to a judgment dated and entered September 25, 1998 in the New York County Clerk's Office, in an action entitled *Kenneth Heller, individually, and Kenneth Heller, P.C. v. Jeannette Yannitelli*, N.Y. Co. Clerk's Index No. 107281/97 (Hon. Stuart Cohen).

belonging to client). Petitioner then sued Mrs. Yannitelli on disputed promissory notes (R. 873-881), a clear conflict of interest. *See Matter of Benjamin*, 129 A.D. 2d 886, 887-889 (3rd Dep't), *appeal dismissed*, 70 N.Y. 2d 660 (1987).[6]

In 1995, after a three-year hiatus during which almost nothing happened in the underlying wrongful death action (R. 823-824, 825 ¶ 7), Petitioner negotiated a settlement with the remaining defendant after only a few social dinners with its insurer's adjuster (R. 777). But, Petitioner did not move to have a court fix his fee nor did he pay over even a portion of the new 1995 settlement proceeds.

In violation of the negotiated FULL RELEASE settlement agreement between the Yannitellis and the remaining defendant, to which agreement Petitioner was a party (R. 1234), he took sole possession of the 1995 settlement proceeds; and, he did so purportedly in his individual capacity as attorney for decedent's Estate (R. 554), a position he did not have (R. 614, 615) and legally could not have.[7] Although such settlement proceeds

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6. That 1992 lawsuit on the notes was discontinued (R. 585, 698 ¶ 1). But, in 1996, Petitioner caused the incorporation of Rio Palm Realty Corp. and, during the last two years, while still Mrs. Yannitelli's attorney of record here, he unsuccessfully sought to have his alter ego, Rio Palm, sue Mrs. Yannitelli on those same notes in Florida and again in New York. *See* Order of Dismissal, entered September 25, 1997 in the Office of the Circuit Court of the Twentieth Judicial Circuit In and For Lee County, Florida, in *Rio Palm Realty Corp. v. Jeannette Yannitelli*, Case No. 96-2722 CA LG; and, the motion file and judgment of dismissal entered December 1, 1998 in the New York County Clerk's Office, in *Rio Palm Realty Corp. v. Jeannette Yannitelli*, N.Y. Co. Clerk's Index No. 601522/98, I.A.S. Part 13 (Hon. Sheila Abdus-Salaam, J.).

7. *E.g.*, *Matter of Schrauth*, 249 App. Div. 847 (2d Dep't 1937); *Matter of Scanlon*, 2 Misc. 2d 65, 69 (Sup. Bx. Co., 1956) (an attorney represents fiduciaries, not the Estate).

were, by statute, for "the exclusive benefit of the decedent's distributees," EPTL § 5-4.4, except to the extent that a court subsequently fixes and authorizes counsel fees to be paid out of such proceeds, Petitioner did not seek judicial relief under EPTL §§ 5-4.4 and 5-4.6 or 22 NYCRR § 603.7. Instead, he wrongfully transferred the proceeds to Dean Witter Reynolds, Inc., a non-bank entity which does not maintain escrow accounts (R. 1239 ¶ 3), a clear violation of DR 9-102(b)(1) (client's funds must be deposited in escrow, in a bank) depositing such proceeds into a so-called "Kenneth Heller, *P.C.*, Special Account" (R. 1327-1328; 1333) (emphasis added).

Having hidden the proceeds, Petitioner advised the Yannitelli family, in writing, that no one would be paid anything from the "funds which are under *my control*" (R. 1056; emphasis added; R. App. A) until his claim on the putative notes of Mrs. Yannitelli was first satisfied. After Mrs. Yannitelli and her sons retained new counsel to locate and recover the 1995 settlement proceeds, Petitioner threatened in writing to return the settlement proceeds to the insurance company, both to protect himself from disciplinary proceedings which had just been commenced against him (R. 593-594 n.5), as well as to make *defendant*'s insurer's adjuster "more comfortable" (R. 703, 705, 707, R. App. B; and 1525, R. App. C), thereby preferring his own interests and the interests of the adversary's adjuster above the interests of his own clients, in violation of DR 5-104(a), DR 7-101(a)(1) and (3)

None of the foregoing is disputed by Petitioner; to the contrary, all of it is established by the incontestable documentary evidence.

In addition, when Petitioner belatedly moved to fix his fee which was payable, if at all, out of the 1995 settlement proceeds, he sought to hold back $250,000 on his claim of approximately

$126,000 on the putative "notes" (R. 549, 553), to the financial detriment of Mrs. Yannitelli *and* her sons (R. 576-577; 826 ¶ 10). Worse yet, in response to the Yannitelli's cross-motion seeking recovery of the 1995 settlement proceeds, the Petitioner made a claim to all — *and even more than all* — of such proceeds (R. 787, 786, R. App. D)[8].

From the beginning of this civil fee dispute, the Yannitellis consistently urged that due to Petitioner's repeated unethical behavior, he had to pay over the entire 1995 settlement proceeds and was not entitled to any fee (R. 562; 570-571; 593-595; 596-597; 600; 755-759 at 758).

After multiple motions by Petitioner (seeking the same or virtually identical relief) (P. App., C, pp. 22a-28a), the trial court held that he had forfeited his entitlement to any additional fees beyond what he received in 1992 for all services then to date, due to his undenied documented multiple violations of the New York Code of Professional Responsibility, state statute and court rules (P. App. B, pp. 15a-19a; P. App. C, p. 29a).

Petitioner had notice of all proceedings in the trial court and the opportunity to offer evidence, and repeatedly appeared before the trial court and the Appellate Division. Despite numerous opportunities, Petitioner did not raise any U.S. Constitutional or other federal issues in either of those courts. Further, he never asserted in any court that passed upon the case the claims now urged.

The only alleged facts belatedly questioned by Petitioner (P. App., F, G, pp. 34a-38a, 39a-41a) either are irrelevant to

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8. A court has the discretion to award up to or less than the agreed-upon contingency percentage of the recovery, but the attorney is never entitled to more (*e.g.*, R. 638, lines 7-11, 13-14; R. 640-641); and, excessive fees violate DR 2-106(A), (B).

whether Petitioner repeatedly violated the New York Code of Professional Responsibility and/or are not in dispute (R. 1505-1513; *see* R. App. E). Petitioner's assertions about Mrs. Yannitelli's alleged behavior in Florida and New York in unrelated matters, and Petitioner's attempts to malign Mrs. Yannitelli and her sons, have nothing to do with Petitioner's documented undenied unethical behavior, his violations of state statute and contingency fee contract court rules, or the civil forfeiture of Petitioner's entitlement to any additional fees — let alone any of the newly raised federal due process claims.

Petitioner's argument that the refusal of the trial court justice to recuse herself violated his constitutional rights under due process, without specifying whether it is state or federal due process upon which he relies, was not raised as a constitutional issue in the trial court or in the Appellate Division, and was not passed upon by any state court. In the trial court and in the Appellate Division, Petitioner relied solely upon state common law regarding discretionary recusal as well as statutory compulsory recusal under New York Judiciary Law § 14, not federal — or even state — due process.

The fact that Petitioner may have sought to find some other candidate to support in a judicial election did not give to the trial court justice any stake or personal interest in the outcome of the fee dispute.

Furthermore, the recusal issue was a self-created situation. Within one week of the trial court's Interim Order (R. 1592-1598; P. App., B, p. 10a) which was adverse to Petitioner,[9] the

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9. The Interim Order held that Petitioner could not offset his contested claim on the disputed notes against the 1995 settlement proceeds and directed Petitioner immediately to pay over two-thirds of the net amount of the principal of the 1995 settlement proceeds. Petitioner (Cont'd)

trial court convened a hearing to advise the parties that several discreetly placed telephone calls by Petitioner's some-time counsel, and others, to the trial court justice's election district manager (R. 357-358), had suddenly disclosed that Petitioner allegedly was supporting another candidate for the justice's position. The timing of those phone calls suggests that Petitioner may have attempted to create an apparent recusal situation.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ISSUES WERE NOT PRESERVED FOR APPELLATE REVIEW.

28 U.S.C. § 1257 gives discretionary authority to this Court to review final judgments by the highest state court in which a decision could be had where any right is claimed under the Constitution of the United States. Here, that court was the New York Appellate Division, First Department (P. App., A, pp. 1a-2a), since the New York Court of Appeals denied Petitioner's request for a discretionary appeal with no opinion on any constitutional or other substantive issue (P. App., D, E, pp. 32a, 33a). *See Mellon v. O'Neil*, 275 U.S. 212 (1927) (where the Appellate Division and the Court of Appeals denied leave to appeal, the Appellate Division's substantive decision was that of the highest state court in which a decision could be had).

(Cont'd)
refused to do until *after* his trial court and Appellate Division applications for a stay (R. 422-423, 425) were denied and on Friday, March 8, 1996, he was adjudged in contempt of court (R. 459, lines 24-25 - R. 460, lines 1-3). He purged that contempt on March 11, 1996, by tendering checks to Mrs. Yannitelli and her sons (albeit the checks were post-dated, R. 1666-1670).

While Petitioner here cites "due process" under the Fifth and Fourteenth Amendments to the U.S. Constitution, a "harm v. penalty" analysis under the Sixth and Eighth Amendments, and a due process recusal argument, he did not do so in the trial court or in the Appellate Division and neither of those state courts ruled upon such claims. Further, here Petitioner does not clearly draw a distinction between due process under the New York and the U.S. Constitutions; and, he makes no claim — let alone establishes — that the decision below conflicts with any applicable federal case concerning any of the issues belatedly sought to be raised here.

In *Adams v. Robertson*, 520 U.S. 83 (1997), this Court granted a writ of certiorari on grounds of deprivation of federal due process. Upon review, however, this Court held that it was clear that the petitioner had failed to raise the federal due process issue in the Alabama Supreme Court *and* show that the highest state court which rendered a substantive decision had passed upon that federal issue. In fact, the Alabama Supreme Court had ruled upon state law issues only. This Court held that certiorari had been improvidently granted and dismissed the writ, adhering to its traditional policy that it will not consider a petitioner's federal claim unless properly presented to and addressed by the state court that rendered the decision to be reviewed. *Id.* at 87. *See also Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (refusing to consider substantive due process claim because not raised below and because the state courts did not address that issue); *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219 (1983).

In *Webb v. Webb*, 451 U.S. 493 (1981), this Court held that its jurisdiction to review the results of the highest state court to pass upon the issues arises "only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

Id. at 496-497. This Court noted that using a generic phrase — there, "full faith and credit" — was not sufficient to establish in this Court that a federal issue had been raised below; and, this was particularly so where, as here, the highest state court to rule on the case neither mentioned nor expressly passed upon the federal issue. *Id.* at 495.

Under these cases, Petitioner had the burden to show that his newly-asserted claims of deprivation of federal due process had been presented to, urged in and passed upon by the Appellate Division — *and* to show where, in the Record, such federal issues had been raised. Petitioner did not do so because he could not do so, inasmuch as no federal issues were presented to the trial court or in the Appellate Division.

Petitioner's claim that the result below, forfeiting his entitlement to an additional fee due to his undisputed multiple violations of the Code of Professional Responsibility, was excessive and in violation of the Eighth Amendment, also does not confer jurisdiction in this Court because, among other reasons, that claim was not raised in and passed upon by the state courts. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988).

Nor should this Court seek to find an exception to the jurisdictional statute and long standing rule that federal issues must be properly raised, prosecuted *and* passed upon in state court to confer jurisdiction, when the only result of granting certiorari would be to provide another opportunity for Petitioner to meritlessly harass and abuse his clients, who have already been forced to incur fees in excess of $373,866.91 just to obtain the money which rightfully belonged to them.[10]

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10. In addition to Petitioner's repetitive motions in the trial court (P. App., C, pp. 23a-28a), and his wrongful refusal to comply with the

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(Cont'd)
Interim Order until after being held in contempt of court, n.9, *supra*, in February, 1996 Petitioner sued for a declaratory judgment seeking essentially the same relief as he then sought on all of his pending trial court motions in this fee dispute special proceeding; that declaratory judgment action, entitled *Kenneth Heller v. Jeannette Yannitelli, Vincent Yannitelli, Tino Yannitelli, Anthony Yannitelli and Donato Yannitelli*, N.Y. Co. Clerk's Index No. 103745/96, was dismissed by judgment entered in the New York County Clerk's Office on August 21, 1996. Further, pending his appeal from the subject trial court Order, Petitioner — who lost in the trial court — nevertheless sought the release *to him* of the settlement proceeds then held by Dean Witter by way of two unsuccessful motions in the Appellate Division and one in the Court of Appeals, and he thereafter repeatedly sought to stay his own appeal. He also sued Mrs. Yannitelli to recover the fee, the entitlement to which here had just been declared forfeited, in a plenary action for breach of contract, unjust enrichment and in quantum merit, in *Kenneth Heller, individually, and Kenneth Heller, P.C. v. Jeannette Yannitelli*, N.Y. Co. Clerk's Index No. 606031/96, which was dismissed pursuant to judgment entered in the New York County Clerk's Office on June 30, 1997. He also sued Mrs. Yannitelli for alleged defamation; and, he twice sought to have his alter ego, Rio Palm Realty Corp., sue Mrs. Yannitelli on the putative "notes", *see* nn. 5 and 6, *supra*; and, on August 11, 1998, Petitioner filed yet another lawsuit against Mrs. Yannitelli on these same putative "notes" (albeit phrased as alleged breach of an inappropriate 1992 escrow), in *Kenneth Heller, individually, (and Kenneth Heller, P.C.) v. Jeannette Yannitelli*, N.Y. Co. Clerk's Index No. 98/603943.

Lastly, after the balance of the 1995 settlement proceeds were finally paid over by Dean Witter in July, 1998, Petitioner unsuccessfully moved for a return of such proceeds. Because of the history of Petitioner's repetitive litigation tactics, by Order dated December 11, 1998, entered in the New York County Clerk's Office on December 15, 1998, the trial court in this case not only denied Petitioner's spurious motion, but also enjoined Petitioner from bringing any further actions, proceedings or motions against the Yannitellis (and certain other designated persons) in any state or federal court without prior leave of the trial court.

II.

THE SUMMARY DECISION AGAINST PETITIONER RAISES NO DUE PROCESS ISSUES.

The requirements of due process were fully safeguarded in the proceedings below. Petitioner had notice of all proceedings below, as evidenced both by his repetitive motions and responses to the various Yannitelli cross-motions in the trial court, and on his appeal and his repeated motions to stay that appeal, to supplement the Record on Appeal and to submit a supplemental appellate brief. In the trial court, Petitioner had numerous opportunities to introduce evidence and did so, but utterly refused to contest Respondents' substantial documentary evidence of Petitioner's unethical conduct and his violations of law and court rules, thereby rendering such evidence admitted. Indeed, almost all of the evidence of Petitioner's unethical behavior was proved in the trial court by Petitioner's own undisputed letters and his written sworn court submissions — as well as his undenied improper acts and inactions. Petitioner appealed without denying that he acted unethically, asserting only (but for the first time on appeal) that his *admitted* repeated violations of the Code of Professional Responsibility were not as reprehensible as violations by other attorneys in other cases.

Under such circumstances, where Petitioner was fully involved at all stages below, and the facts of his unethical behavior were documented by Petitioner's own writings and thus undisputed, the requirements of due process have been met and no evidentiary hearing was required. *Kicking Woman v. Hodel*, 878 F.2d 1203, 1208 (9th Cir. 1989).

It is axiomatic that an attorney who violates the Code of Professional Responsibility forfeits entitlement to a fee.

Petitioner is a seasoned attorney and knew (or should have known) of, and in any event, was bound by that rule.

Pursuant to New York Civil Practice Law and Rules § 3212, summary judgment is to be granted when there is no genuine question of material fact. Indeed, New York courts frequently declare on motion (without an evidentiary hearing) that an attorney's fee is forfeited due to unethical behavior where, as here, there is no factual dispute as to what the attorney has done. *E.g.*, *Brill v. Friends World College*, 133 A.D. 2d 729 (2d Dep't 1987) (summary judgment, denying a legal fee as a matter of law); *Winston v. Rogers & Wells*, 214 A.D. 2d 677 (2d Dep't 1995) (legal fee forfeited, without any evidentiary hearing, on the *mere appearance* of counsel's impropriety despite the Surrogate's finding that there were questions of fact as to whether counsel actually violated the Code of Professional Responsibility).

Similarly, under Fed. R. Civ. P. 56, "[s]ummary judgment is appropriate when there is no genuine issue of *material* fact and the moving party is entitled to judgment as a matter of law [cit. om.]" *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *see also Warner-Jenkinson Co., Inc. v. Hilton David Chemical Co.*, 520 U.S. 17, 1997 U.S. LEXIS 1476 *41 n.8 (1997) (summary relief by the court is appropriate when, on the particular facts of the case, there is no *material* fact issue to be resolved by the trier of facts); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In the case at Bar, the Petitioner was willing to proceed in the trial court upon his multiple motions (P. App., C, pp. 22a-26a).[11] It was not until late February, 1996, after numerous

---

11. Thus, the parties charted their procedural course to proceed strictly on papers and oral argument. *Mitchell v. N.Y. Hospital*, 61 N.Y. 2d 208, 214 (1984); followed, *Mill Rock Plaza Assoc. v. Lively*, 224 A.D. 2d 301 (1st Dep't 1966).

motions had been argued and submitted for disposition, that Petitioner first attempted to raise factual questions (P. App., F, p. 34a-38a, at 34a), albeit on totally irrelevant or non-existent issues (*see* R. 1505-1513; R. App. E). Further, when Petitioner belatedly moved for an evidentiary hearing, he did so solely upon *state* civil procedural grounds, CPLR § 2218 (R. 1366-1367), not pursuant to a request for a criminal trial nor claim of federal — or even state — due process. Therefore, Petitioner may not raise due process claims in this Court.

In any event, an evidentiary hearing on Petitioner's irrelevant issues regarding Mrs. Yannitelli would not have altered the finding, based upon the undisputed documentary evidence, that Petitioner violated the Code of Professional Responsibility. Therefore, Petitioner was not legally prejudiced nor denied due process simply because there was no evidentiary hearing in respect of Mrs. Yannitelli's irrelevant alleged acts. *See United States v. Jennings*, 724 F.2d 436, 450-451, *reh. den.*, 726 F.2d 168 (5th Cir. 1984).

Petitioner now asserts, for the first time in *any* court, that due process requires that he should have been given an opportunity to "purge" his unethical behavior. But, the Record establishes that this argument, too, was not raised, pressed or ruled upon in the state courts. It may not be raised here.

Moreover, Petitioner ignores the fact that in his numerous repetitive motions in the trial court he repeatedly had such opportunity. But, instead of trying to rectify his wrongs, from the outset when he wrongfully took sole possession of the 1995 settlement proceeds and improperly transferred the money to a non-escrow account in a non-bank entity in the name of his "P.C." and then sought to hold the Yannitellis' money, EPTL § 5-4.6, or a portion thereof, hostage to his unrelated disputed claim on the putative "notes", continuing through his numerous

lawsuits against Mrs. Yannitelli while still her attorney of record in the underlying wrongful death action, *see* nn. 5, 6 and 10, *supra*, Petitioner repeatedly committed multiple violations of the Code of Professional Responsibility.

III.

THERE WAS NO EIGHTH AMENDMENT VIOLATION OF PETITIONER'S RIGHTS.

Petitioner argues that the failure of the trial court to award him an additional fee is an excessive forfeiture in violation of the Eighth Amendment to the U.S. Constitution. Petitioner did not previously raise this argument. It may not be raised here.

In addition, this new claim has no merit. The Eighth Amendment generally applies to fines and penalties, in whole or in part, payable to the government and not to civil forfeitures of property: here, clients' funds to be paid over to the clients. To the contrary, the Eighth Amendment basically constitutes a limit on the government's power "to extract payments" to the sovereign "as punishment for some offense" in violation of the criminal law. *Austin v. United States*, 509 U.S. 602, 609-610 (1993); *see also United States v. Bajakajian*, __ U.S. __, 118 S. Ct. 2028, 2037-2038 (1998); and *Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 262-263 (1989). Further, the Eighth Amendment does not apply to a "harm v. penalty" analysis in a civil forfeiture proceeding, *United States v. Ursery*, 518 U.S. 267, 284 (1996), contrary to the belated assertions of Petitioner.

In this proceeding, Petitioner's writings and undisputed acts conclusively established his repeatedly purposeful violations of the New York Code of Professional Responsibility, its statutes and court rules. Thus, here, there was repeated active

misconduct by Petitioner. Further, the size of the claimed one-third fee declared forfeited (approximately $560,000.00 in October, 1996 when the trial court declared Petitioner's entitlement to any fee forfeited, which with interest was approximately $717,000.00 when Dean Witter made payment in July, 1998) was less than twice the amount of the legal fees to date which Petitioner imposed upon the Yannitellis by reason of his abusive litigation tactics. Furthermore, this was neither the first — nor even the last — case in which Petitioner's actions as an attorney (and, even as a party) have run afoul of court rules and procedure. In short, Petitioner is the quintessential recidivist.[12]

---

12. The egregiousness of Petitioner's documented unethical conduct and improper actions in this proceeding is underscored by other cases where he has been sanctioned. *See Yannitelli and Heller v. Navieras de Puerto Rico, et al.*, 1985 WL 440, at p. 3 of LEXIS print (S.D.N.Y. 3/21/85), *and* 106 F.R.D. 42, 44-45 (S.D.N.Y. 4/29/85); *Mate Picnic v. Seatrain Lines, Inc.*, 189 A.D. 2d 622, 623 (1st Dep't), *lv. app. den.*, 81 N.Y. 2d 709 (1993) (on appeal, the Appellate Division imposed a $5,000 sanction upon Petitioner, warning Petitioner that his failure to promptly pay would be referred to the Disciplinary Committee); *Stockler & Co. v. Heller*, 189 A.D. 2d 601, 603 (1st Dep't 1993) (affirming award of costs and attorney's fees, due to Petitioner's "totally frivolous" assertions, submitted "just really to delay"); *Heller v. Winter*, __ A.D. 2d __, NYLJ, 5/05/97, p. 27, col. 3 (1st Dep't 1997); and, most recently, *Kenneth Heller v. Louis Provenzano, Inc.*, __ A.D. 2d __, NYLJ, 1/11/99, p. 26, col. 1 (1st Dep't 1999) (remanding for a new trial, but unanimously affirming the imposition upon Petitioner, personally, of the then maximum New York State sanction of $10,000 as "a relatively mild one").

IV.

THE FAILURE OF THE TRIAL COURT JUSTICE TO RECUSE HERSELF DID NOT VIOLATE PETITIONER'S RIGHTS OF FEDERAL DUE PROCESS.

On the recusal issue, Petitioner once again urges upon this Court a matter not raised below.

In March, 1996, after months of motion practice and oral arguments thereon, and only after the Interim Order and the trial court's appropriate disclosure of the telephone calls placed to the trial court justice's district election manager, Petitioner for the first time objected to the trial court justice deciding the fee dispute. He did not do so on the basis of federal due process, however, but only on claims of common law and state statute. Therefore, questions of recusal under federal due process are foreclosed to Petitioner in this Court.

In any event, most questions of recusal are matters answered by common law, state statute or professional standards of the bench and bar. *Bracy v. Gramley*, 520 U.S. 899 (1997). The only federal issue in such cases is whether a judge has actual bias against the party complaining or an interest in the outcome of the particular case. *Bracy*, *supra*. Petitioner failed to show either.

Under New York Judiciary Law § 14, recusal is required only where a judge has a direct interest in the outcome of the case at bar, or there is either consanguinity or affinity between judge and parties, none of which is present here — not even in the argument made by Petitioner. Thus, the New York rule is consistent with and not in conflict with the federal rule. *Bracy*, *supra*.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID M. RABINOWITZ
Counsel of Record
MOSES & SINGER LLP
Attorneys for Respondents Jeannette Yannitelli (and her four non-party distributee-beneficiary sons)
1301 Avenue of the Americas
New York, New York 10019
(212) 554-7800

Of Counsel:

JOEL DAVID SHARROW
ARTHUR F. ABELMAN

APPENDIX

APPENDIX A — KENNETH HELLER'S LETTER TO JEANETTE YANNITELLI DATED JUNE 30, 1995 SEEKING PAYMENT OF PROMISSORY NOTES

KENNETH HELLER
COUNSELOR AT LAW
PROCTOR IN ADMIRALTY
291 BROADWAY - SUITE 1407
NEW YORK, NEW YORK 10007

(212) 982-6085
(212) 941-7485 (FAX)

June 30, 1995

Mrs. Jeannette Yannitelli
Mr. Donato Yannitelli,
Anthony Yannitelli,
and Vincent Yannitelli
55 Chestnut Street
Cold Springs, N.Y. 10516

Re: Yannitelli v. D. Yannitelli & Sons Construction Corp.
Supreme Court, New York County, Index No. 4888/80

Dear Yannitelli Family:

Please be advised that we hold outstanding promissory notes totalling $121,865.17.

We have persistently requested that they be paid by Mrs. Yannitelli.

The mose recent is a remaining sum of $5,000.00 from $10,000.00, of which only $5,000 was repaid, leaving the balance as above.

Appendix A

The balance of $126,865.17 must be fully repaid prior to the distribution of any funds which are under my control.

Very truly yours,

Kenneth Heller

KH/

APPENDIX B — KENNETH HELLER'S TELEFAX COMMUNICATIONS TO MOSES & SINGER LLP DATED AUGUST 23, 25 AND 28, 1995

FAX COVER SHEET

DATE: 8/23/95

TO

FAX: 554-7700 CLIENT: YANNITELLI

. . . .

NAME: PHILLIPPE ZIMMERMAN, ESQ.
FIRM: MOSES & SINGER
CITY: NYC STATE: NY . . . .

FROM

KENNETH HELLER, P.C.
291 Broadway, Ste. 1407
New York, NY 10007
TEL#: (212) 962-6085
FAX#: (212) 941-7485

NO. OF PAGES *INCLUDING* COVER PAGE: ONE

TITLE AND BRIEF DESCRIPTION OF ENCLOSURE OR MESSAGE:

I RECEIVED A COMPLAINT FROM THE DISCIPLINARY COMMITTEE TODAY FILED BY MRS. YANNITELLI. BECAUSE OF THE COMPLAINT, I REVOKE MY CONSENT TO ADJOURNMENT OF THE MOTION TO APPROVE DISTRIBUTION OF THE SETTLEMENT, RETURNABLE SEPTEMBER 1, 1995. IT IS NOW URGENT

Appendix B

THAT THIS MATTER BE RESOLVED IMMEDIATELY, CONTEMPT REMITTANCE OF ALL FUNDS TO DEFENDANTS' COUNSEL PENDING DECISION.

KENNETH HELLER

* * *

FAX COVER SHEET

DATE: 8/25/95

TO

FAX: 554-7700 CLIENT: YANNITELLI

. . . .

NAME: ARTHUR F. ABELMAN, ESQ.
FIRM: MOSES & SINGER
CITY: NYC STATE: NY . . . .

FROM

KENNETH HELLER, P.C.
291 Broadway, Ste. 1407
New York, NY 10007
TEL#: (212) 962-6085
FAX#: (212) 941-7485

NO. OF PAGES *INCLUDING* COVER PAGE: ONE

TITLE AND BRIEF DESCRIPTION OF ENCLOSURE OR MESSAGE:

Appendix B

IN RESPONSE TO YOUR 8/25/95 FAX WITH STIPULATION, I CANNOT AGREE TO ADJOURN IN VIEW OF MRS. YANNITELLI'S COMPLAINT TO THE GRIEVANCE COMMITTEE THAT I AM WITHHOLDING "HER MONEY." FURTHER, I AM UNDER A CONSTRAINT BY DENNIS DOODY, USAIG, TO OBTAIN AN ORDER TO DISBURSE MONIES, TO MAKE HIM MORE COMFORTABLE IN VIEW OF THE COMPLAINT AGAINST ME. THEREFORE, IF ANYONE ELSE IS TO HOLD THE MONIES, I WOULD PREFER IT TO BE MR. DOODY, OR MR. LOUIS MARTINEZ, ESQ., HIS ATTORNEY.

KENNETH HELLER

* * *

FAX COVER SHEET

DATE: 8/28/95

TO

FAX: 554-7700 CLIENT: YANNITELLI

. . . .

NAME: ARTHUR ABELMAN, ESQ.
FIRM: MOSES & SINGER

* * *

Appendix B

FROM

KENNETH HELLER, P.C.
291 Broadway, Ste. 1407
New York, NY 10007
TEL#: (212) 962-6085
FAX#: (212) 941-7485

NO. OF PAGES *INCLUDING* COVER PAGE: ONE

TITLE AND BRIEF DESCRIPTION OF ENCLOSURE OR MESSAGE:

RE: YOUR 8/28/95 FAX LETTER

I SAID IN VIEW OF THE COMPLAINT I AM COMPELLED TO RETURN THE FUNDS SO I CAN PROTECT MYSELF

s/ Kenneth

* * *

APPENDIX C — KENNETH HELLER'S LETTER TO MOSES & SINGER, LLP, DATED AUGUST 10, 1995

KENNETH HELLER
COUNSEL AT LAW
PROCTOR IN ADMIRALTY
291 BROADWAY - SUITE 1407
NEW YORK, NEW YORK 10007
(212) 962-6085
(212) 941-7485

August 10, 1995

BY FAX AND BY REGULAR MAIL

Moses & Singer, LLP
1301 Avenue of the Americas
New York, NY 10019-6076

Attn: *Joel David Sharrow, Esq.*

Re: *The Yannitelli Family*

Dear Sir:

This is a death case and, notwithstanding your demands, I cannot pay any monies without a court order; under EPTL §5-4.4, only the court can approve fees, disbursements and amounts. A copy of the May 5, 1992 order of Justice Greenfield approving distribution of settlement proceeds from the Mid-Hudson and Dennis settlement is enclosed for your reference.

I am trouble by your apparent personal attack upon me and my veracity.

Appendix C

I still do not have anything from my clients, in writing, instructing me or allowing me to talk to you.

The threatening climate seems to require me to protect myself and, for this reason, I am assuming that the Yannitelli family wants a change of attorneys.

I am, therefore, instructing my associate to proceed to ask the court to relieve me from my representation of the family.

I will then, in order to protect myself, consider remitting the funds back to Mr. Louis Martinez, attorney for the carrier.

APPENDIX D — PORTION OF KENNETH HELLER'S AFFIDAVIT DATED SEPTEMBER 22, 1995

* * *

6. Attorney Heller is, Alternatively, Entitled to Attorney's Fees Based on Quantum Meruit, If Yannitelli Revokes the Contingency Retainer Agreement.

Should this Court determine that the attorney-client contingency retainer agreement is no longer in force, Attorney Heller is entitled to payment for legal services and his disbursements pursuant to quantum meruit.

During the April 21, 1992 hearing (Exhibit 1), at p. 20, ll. 7-11, Attorney Heller advised the Court the hours spent on this case were enormous. (See, also, p. 35, ll. 3-8).

The Court recognized that most of the hours were expended on the claim against defendant D. Yannitelli & Sons Construction Corp., including the trial itself, which ended in a mistrial. (Exhibit 1, p. 22, ll. 9-17).

Attorney Heller previously advised the Court and his client that the time expended on the case, as of March 17, 1992, exceeded 4,000 hours over a period of 13 years. (Exhibit 7)

At the rate of $350.00 per hour, Attorney Heller is entitled to $1,400,000.00.

Attorney Heller estimates he has spent an additional 1,000 hours over the next three years, for an additional sum of $350,000.00.

Attorney Heller demands that the Court order the Yannitellis to pay Attorney Heller the sum of $1,750,000 to compensate him for his time on a quantum meruit basis.

7. Law of the Case, Res Judicata and Estoppel Against Inconsistent Position Preclude Transfer of This Case to Any Other Court.

The December 31, 1980 order of Justice Oliver Sutton, filed January 7, 1981 (Exhibit 8) denied defendants' motion to change the venue of this case from New York County to Putnam County.

The case was commenced in New York County, tried in New York County, and settled as to all parties in New York County.

Law of the case bars any attempt to belatedly transfer this action to Putnam County, or to any other court, to resolve the remaining ministerial action of directing a compromise and settlement, distribution and payment of attorney's fees and disbursements.

8. Plaintiff Yannitelli Must Post A Bond For $1,700,000 As a Quid Pro Quo Should This Court Direct A Turnover of the Settlement Fund to Yannitelli or Her Incoming Attorneys.

Attorney Heller has an attorney's lien on the settlement fund in his possession to secure payment of his attorney's fees and disbursements.

Appendix D

Attorney Heller is entitled to his disbursements of $30,375.06

Attorney Heller is entitled to his one-third contingency fee on the net amount of the settlement, for a total of $556,541.67.

Alternatively, Heller is entitled to the entire sum of $1,700,000 for his attorney's fee based on quantum meruit.

APPENDIX E — PORTIONS OF AFFIDAVIT OF DAVID PICKER, ESQ., DATED FEBRUARY 28, 1996

* * *

ARGUMENT

I. HELLER'S MOTION MUST BE DENIED

A. *Heller Is Not Entitled to a Jury Trial In This EPTL § 5-4.6 Wrongful Death Distribution Proceeding*

There are No Material Factual Disputes To Be Determined

10. According to attorney Heller (Heller Aff. p.7 [bottom]), his motion "is primarily a motion to determine issues of fact." The law recognizes no such creature.[2]

11. More important, there must be a genuine issue as to a fact material to the motion. But that is utterly *lacking* here.[3] It is for the Court, as a matter of law, to determine the genuiness and the materiality of an alleged factual dispute. As shown below, attorney Heller's latest motion is just a bald attempt to make an end run around constitutional due process and the CPLR, as to issues that are not the subject of these proceedings.

---

2. Nor is attorney Heller entitled to make a motion under CPLR § 2218. CPLR § 2218 merely allows ("The court *may* order . . ."), but does not require, the Court to refer an issue of fact raised on a motion to be separately tried.

3. This distinguishes the cases cited by attorney Heller, which are therefore inapplicable.

Appendix E

12. Thus, attorney Heller has burdened the Court with a list (Heller Aff. pp. 11-13) of some 18 alleged factual issues which he claims the Court must decide before it can decide the legal issues. Heller is wrong, as a review of these issues establishes:

> "1. Did Mrs. Yannitelli retain Mr. Heller and sign a retainer on June 21, 1978?
>
> 2. Was this retainer intended to include the action against D. Yannitelli & Sons?"

13. This is not disputed. It is also not disputed that Heller and Mrs. Yannitelli sign the retainer (Heller. Aff. Exh. 7) in a capacity (Administratrix of the deceased estate) that she never held.

14. Nor is there any issue of "fact": construction of the written retainer agreement is for the *Court* (*e.g.*, *West, Weir & Bartel, Inc. v. Carter Paint Co.*, 25 N.Y.2d 535, 540 (1969)), giving due regard to the law that retainer agreements are to be strictly construed against the attorney (*e.g.*, *Shaw v. Manufacturers Hanover Tr. Co.*, 68 N.Y.2d 172, 174, 177 (1986)).

15. More important, all issues as to the retainer agreement are *immaterial*, because as we have established, as a matter of law, retainer agreements are not binding on this Court in this E.P.T.L. § 5-4.6 distribution proceeding. *E.g.*, *Nicastro v. Park*, 186 A.D.2d 805 (2d Dep't 1992). Attorney Heller himself recognized this at argument before Justice Greenfield (Heller Aff. Exh. 8, pp. 14-15).

16. The retainer agreement is further immaterial because of attorney Heller's subsequent documented misconduct.

> "3. Did Mrs. Yannitelli affirm the validity of the retainer agreement before Justice Greenfield?"

17. Again, this is immaterial for the reasons just stated. Moreover, there is no dispute as to what Mrs. Yannitelli said to Justice Greenfield on the record in defense against attorney Heller's attempt to grab even more money than he'd agreed to in his retainer agreement.

> "4. Did Kenneth Heller request Quantum Meruit from Justice Greenfield?"

18. This is not disputed. Its only relevance is to show that attorney Heller has acknowledged and knows that the amount of his fee, if any, is committed to the discretion of the Court.

> "5. Did Justice Greenfield deny Quantum Meruit . . . to . . . Heller and . . . does Kenneth Heller have a right to demand Quantum Meruit here?"

19. This is also not disputed. It is also not dispute that Justice Greenfield declared that the Court may grant quantum meruit to depart downward, but *never upward*, from the retainer's agreement (*see* Heller Aff. Exh. 8, pp. 19-20). And attorney Heller's "right" to "demand" quantum meruit does *not* mean he is entitled to it!

> "6. Did Mrs. Yannitelli over the years from 1978 on, execute a series of promissory notes for which she received the money.

7. Did Mrs. Yannitelli execute a note in 1995 for $10,000 and repay only $5,000 of same."

20. This dispute is immaterial. Heller has not sued on the alleged notes, and they and any debt they may represent are not before the Court. Yet he is here suddenly seeking a *jury trial* on this immaterial and *not*-sued-upon issue. Constitutional due process and the C.P.L.R. prohibit this absurd attempt.

21. Furthermore, as a matter of law, attorney Heller may not off-set or lien against the proceeds of this action any such debt he may claim (*see Kaplan v. Reuss*, 113 A.D.2d 184, 186 (2d Dep't 1984), *aff'd*, 68 N.Y.2d (1986); *Adan v. Abbot*, 114 Misc.2d 735, 736-37 (Sup. Ct. N.Y. Co. 1982)). His attempts to do so here constitute misconduct.

"8. Did Mrs. Yannitelli pilfer the notes from Kenneth Heller's office on March 13, 1990?

9. Did Mrs. Yannitelli steal $22, 850 from Mrs. & Mrs. Pires' home in Seminole, Florida on April 13, 1991?"

22. These absurd and libelous fabrications are not relevant to *Heller's* conduct and whether or not he is entitled to a fee in this case, the only issue genuinely before the Court. These fabrications have no legitimate purpose in this case.

"10. Did Kenneth Heller request of Justice Greenfield that he be relieved in representation of Mrs. Yannitelli in 1990?

11. In May, 1992 was Kenneth Heller granted permission by Justice Greenfield to be conditionally relieved at the conclusion of the entire case?"

23. There is no record or evidence of any of this. Attorney Heller's attempt to create a so-called "fact issue" by his self-serving statement as to what was supposedly done off the record is almost laughably outrageous. Not surprisingly, attorney Heller never before alleged this, neither when he first moved to withdraw in August 1995, nor when he again moved to withdraw on February 1, 1996. In any event, neither Mrs. Yannitelli nor the Court is bound by what Justice Greenfield may or may not have said *off* the record in an informal conference.

> "12. Did Kenneth Heller bring on a motion in May, 1992 to be relieved as counsel?"

24. This is not disputed. It is also not disputed that attorney Heller *withdrew* that motion. It is also not disputed that his said motion to withdraw (*see* accompanying J. Yannitelli Aff., Exh. 6) was *not* based on any of the alleged "criminal misconduct" he now belatedly accuses his client of.

> "13. Did Mrs. Yannitelli execute a series of notes in 1991 to replace the stolen notes?"

25. The notes which attorney Heller induced his client to sign under false pretenses were not "to replace" any other notes. Moreover, as previously explained, the alleged notes and debts (if any) of Mrs. Yannitelli are not the subject of or relevant to this lawsuit.

> "14. Was motion to be relieved withdrawn in 1992 upon Mrs. Yannitelli depositing in escrow a sum of money that she received to guaranty payment by her of promissory notes?"

26. The motion was withdrawn. Mrs. Yannitelli's share of proceeds were deposited in escrow — and then ultimately all paid to her. None of this is relevant.

> "15. Did Mrs. Yannitelli in 1994 while Mr. Heller was still her attorney seek out adversaries who she knew were in litigation with Mr. Heller and deliver false and defamatory statements accusing Mr. Heller and a Justice of the Supreme Court of wrong doing?"

27. What Mrs. Yannitelli said is on the record and undisputed (*see* her Feb. 10, 1996 Aff. ¶¶ 23-29). It is also not relevant.

28. Furthermore, there were no false statements and no wrong-doing was alleged. To the contrary, Justice Wright apparently *agreed* that it would be inappropriate for him to continue on that case, and he recused himself (*see* accompanying J. Yannitelli Aff. Exh. 8). And attorney Heller *continued* to represent Mrs. Yannitelli thereafter. Again, this allegation has nothing to do with this proceeding.

> "16. Did Mrs. Yannitelli sign a letter confessing to the fact that she brought false information and was suffering from jealous, menopausal, sometimes intoxicated rage?"

29. Attorney Heller induced her to sign this letter, or he would not re-try her case. Again this letter has nothing to do with the issues before the Court.

> "17. Is Mrs. Yannitelli a jealous, vengeful person?"

30. Of course not. And we gladly invite comparison by the Court between Mrs. Yannitelli's conduct in this litigation and attorney Heller's. Nor is this highly personal attack in any way material to this proceeding. Finally:

> "18. Did Kenneth Heller recover $1,700,000 for Mrs. Yannitelli and her family and did they accept his amount?"

31. As even attorney Heller admits, this is not disputed.

The One Fact Issue that Is Material Is Undisputed

32. What is most significant is the critical issue that attorney Heller does *not* claim is disputed: he does not deny that he threatened to delay seeking a distribution of these proceeds — to be distributed to *all* the Yannitellis — unless and until Mrs. Yannitelli paid him the *unrelated* debt that he alleges she (and she alone) owes him. One June 30, 1995, he wrote to the Yannitellis:

> "Please be advised that we hold outstanding promissory notes totalling $121,865.17.
>
> We have persistently requested that they be paid by Mrs. Yannitelli.
>
> . . .
>
> The balance of $126,865.17 *must be fully repaid* ***prior*** to the distribution of any funds which *are under my control.*" [Emphasis added].

A copy of this letter was attached to attorney Heller's October 11, 1995 Affidavit. An additional copy is Exhibit A hereto.

33. This disloyalty and misconduct is what forced the Yannitellis to hire Moses & Singer LLP.

34. Thereafter, under pressure from this firm and the Yannitellis, attorney Heller *three* times, in *writing*, threatened to return the settlement proceeds to the defendant's insurer. Copies of his said telefaxes were previously submitted as Exhibits P, R and T to Mrs. Yannitelli's Sept. 12, 1995 Affidavit; additional copies are Exhibit B hereto.

35. Yet, attorney Heller does *not* allege that this creates any factual disputes requiring a hearing. He is *right*: his behavior is *fully documented* and *undisputed*; it raises only *legal* issues for the Court's determination.

36. Attorney Heller's undisputed actions constitute attorney misconduct, a breach of his strict fiduciary duty of loyalty to his client, and breach of his contract of retention as her attorney. Indeed, Judiciary Law § 487(2) makes it a *crime* (misdemeanor) for an attorney to "wilfully delay[ ] his client's suit with a view to his own gain." That is precisely what Heller did here.[4]

---

4. In addition, DR 5-103(B) prohibits an attorney from lending money or giving other financial assistance to a client while litigation is pending. DR 5-104(A) prohibits an attorney from engaging in business transactions with a client in most situations. The reasons for these strictures are made painfully obvious by this case.

Appendix E

There Is No Right to a Jury In This EPTL § 5-4.6 Proceeding, which Is Committed to the Discretion of the Court

37. This is not a pleanary action; it is not an action at common law. This is, rather, a statutory summary proceeding, pursuant to E.P.T.L. § 5-4.6, to distribute the proceeds of this wrongful death action and set attorney Heller's fee (if any). Ample case law makes clear that it is for the *Court*, in its discretion, to set that fee. *E.g.*, *Nicastro v. Park*, *supra*. Heller himself correctly argued to Justice Greenfield that the matter of his fee was committed to the Court's discretion (*see* Heller Aff. Exh. 8, pp. 14-15). Thus, there is no right to a jury, even if there were factual issues to be determined (which there are not).

B. *Heller Was Not Previously Discharged By His Client, And If He Had Been, It Would Have Been Because of His Own Misconduct*

38. Attorney Heller seeks to vacate this Court's denial of his previous motion to withdraw on the remarkable, but spurious, grounds that said

> "motion was erroneously brought, because I [Heller] had been earlier discharged . . ., or alternatively, no motion was required, because 'Just Cause' exists and existed pursuant to DR 2-110 . . ."

Heller Aff. p.2. Attorney Heller is wrong on every point.

39. First, he was not discharged, and *could not* have been discharged without a Court order or a formal substitution. DR 2-110(A)(1) makes this clear:

* * *

Supreme Court, U.S.
FILED
FEB 11 1999
CLERK

No. 98-987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH HELLER,

Petitioner,

vs.

JEANNETTE YANNITELLI, individually and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION FIRST DEPARTMENT

REPLY BRIEF FOR PETITIONER

KENNETH HELLER
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14 pp

PRELIMINARY STATEMENT

Kenneth Heller, the Petitioner herein, respectfully submits this Brief in Reply to Respondents' Brief in Opposition.

OBJECTIONS TO RESPONDENTS' COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioner respectfully objects to the Questions Presented submitted by Respondents, inasmuch as they state or imply that: a) the issues raised by Petitioner were not raised and/or decided in the state Court; b) the "evidence" in this matter was not disputed, contested or simply "indisputable"; and c) New York State law does not require recusal where a Judge expresses that her pecuniary interests are threatened by an attorney and political enemy practicing before her.

As set forth in more detail below, all of the issues raised herein, as demonstrated by: a) the Decision rendered by acting Supreme Court Justice Beverly Cohen on August 16, 1996, b) the Memorandum Decision rendered by the New York Supreme Court, Appellate Division, First Department on February 17, 1998, and c) the numerous motions and supporting affidavits and affirmations submitted below, clearly show that the rights claimed by Petitioner, to wit, the excessiveness of the subject punitive forfeiture, the lack of due process and deprivation of a hearing and/or jury trial were raised and passed upon in the proceedings before the aforementioned New York State Courts.

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POINT I

PETITIONER'S ISSUES WERE SUFFICIENTLY RAISED, AND CLEARLY RULED UPON IN THE TRIAL COURT AND THE SUPREME COURT, APPELLATE DIVISION.

Respondents' claim that Petitioner failed to raise the rights and protections sought herein at the trial court and/or upon appellate review, is untenable.

First, the record clearly reveals that Petitioner did, in fact, raise his rights to a jury trial or hearing, as well as the requested recusal by Justice Cohen. *See, e.g.* (R. 1366, P.App. F; R. 19, 21; and R. 19, respectively)[1]. Moreover that Petitioner clearly raised the argument that the penalties inflicted upon him were excessive, is demonstrated in the Decision of the Appellate Division. *See* Memorandum Decision of the New York State Supreme Court, Appellate Division of February 17, 1998 (P.App. 2a)(stating "The penalty of forfeiture of the contingent legal fee was not excessive.")

That Petitioner did not utter the exact words that Respondents seemingly require, does not render Petitioner's timely and strenuous objections before the trial and appellate courts ineffectual.

---

[1] Items designated as ("R.") refer to the Record on Appeal; items designated ("P.App.") refer to Petitioner's Appendix in his Petition for Writ of Certiorari.

To the contrary, all of his claims were made known to the trial court, and raised upon appeal, as noted in the decisions of both courts, which denied those rights.

It has long been settled that "no particular form of words is necessary to be sued [sic] in order that the federal question may be said to be involved . . ." *Dewey v. City of Des Moines*, 173 U.S. 193, 19 S.Ct. 379 (1899).

Furthermore, the record below shows that "a definite issue as to the possession of the right must [have been] distinctly deductible from the record, without an adverse decision of which the judgment could not have been rendered." *See* Capital Nat. Bank of Lincoln, Neb v. First Nat. Bank of Cadiz, Ohio, 172 U.S. 425, 19 S.Ct. 202 (1899).

In the instant case Petitioner clearly protested the denial of his rights now asserted before this Court. *See, e.g.* (P.App. 34a-38a, 42a-44a, R. 19, R. 21, R. 1356, 1366). Moreover, the decisions rendered by the trial Court and the Appellate Division clearly denied those rights.

In her decision of August 16, 1996, acting Supreme Court Justice Beverly Cohen clearly stated, in pertinent part:

> On March 7, 1996 Mr. Heller made an oral motion on the record for me to recuse myself. The motion was denied. (P.App. 11a).
>
> Mr. Heller moves . . . for a

> jury trial on the issue of his fee. (P.App. 12a).
>
> The motions by Mr. Heller for a hearing and to defer the motions to Justice Greenfield are denied. (P.App. 20a).

Clearly, Mr. Heller raised his specific due process rights to a hearing and/or jury trial before Justice Beverly Cohen. Moreover, inasmuch as Justice Cohen was bound by the federal constitution to recognize and respect Mr. Heller's due process rights, the Court's decision could not have been made without a necessary denial of those rights.

Even more telling is the decision of the Appellate Division, which states, in pertinent part:

> The court's denial of recusal was a proper exercise of discretion. (P.App. 1a.)
>
> The penalty of forfeiture was not excessive. (P.App. 2a)
>
> There were no material disputed factual issues requiring an evidentiary hearing. (P.App. 2a)

Again, not only did Petitioner raise his due process rights on appeal, but they were necessarily decided by the Appellate Division, which denied the specific rights claimed by Mr. Heller. Moreover, the Appellate Division expressly found that the "[t]he <u>penalty</u> of forfeiture was <u>not excessive</u> [emphasis added]."

Moreover, the decisions below do not purport to rest upon adequate, independent state grounds that would support such a denial of constitutional rights. Indeed, no state grounds would preempt the supremacy of Petitioner's federal constitutional rights.

Thus, Respondents' argument that this Court lacks jurisdiction over the issues raised by Petitioner unavailing.

POINT II

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED, INASMUCH AS HE CLEARLY DISPUTED ALL OF THE MATERIAL FACTS RELIED UPON BELOW, AND RAISED SERIOUS ISSUES AS TO RESPONDENT'S CREDIBILITY.

Respondents' claims that Mr. Heller alleged violations of the Code of Professional Responsibility were "undisputed," are belied by the volumes of pages in the record, and scores of opposing affidavits submitted by Mr. Heller and Respondents below.[2]

Similarly, despite Respondents' reference to "substantial documentary evidence," Justice Beverly Cohen's decision fails to cite a single page or document in support of Mr. Heller's forfeiture. To the contrary, the accusatory affidavits submitted by Petitioner's client alone fueled Justice

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[2] *See, e.g.*, (P. App. 34a-44a), (P. App. 22a-28a) (listing all of the affidavits and affirmations submitted in this obviously disputed cases), Record on Appeal, generally.

Cohen's entire Decision. Worse yet, Justice Cohen recognized that most, if not all, of the accusations hurled by Mrs. Yannitelli were disputed by the Petitioner.[3]

Thus, Respondents' endorsement of a summary forfeiture of over $700,000 on such vigorously disputed issues cannot be tolerated. More importantly, Petitioner submitted ample evidence that Jeanette Yannitelli was a completely incredible witness. *See, e.g.* (P. App. 39a-40a); (R. 1425-1427, 1429-30, 1557-65)

In fact, Mrs. Yannitelli, in recanting vicious statements she made against Mr. Heller in an unrelated proceeding, prepared, signed and sent a written statement to Justice Bruce Wright (J.S.C.), stating:

> Mr. Heller is the victim of an emotional war.

---

[3]Justice Cohen noted that Mrs. Yannitelli was a scorned lover, (P. App. 4a-5a); that their business relationship was "racked with recriminations and allegations of wrongdoing from both sides, *id.*, at 5a; that Mrs. Yannitelli submitted no proof whatsoever that she invested in any ventures with Mr. Heller, as she claimed, *id.*; that Mr. Heller countered Mrs. Yannitelli's claims about bogus promissory notes, *id.*; that "Mr. Heller claims Mrs. Yannitelli is a liar," *id.*, at 6a; that Mr. Heller made an application to be relieved as counsel, *id.*, at 9a; that Mr. Heller claimed he received the consent of his client's oldest son to place the monies in a Dean Witter account, where they would "yield a higher income," *id.*; that "Mr. Heller has projected the blame for the entire breakdown of his relationship with his client onto Mrs. Yannitelli," *id.*, at 16a.

> Jean Woodlock called me on four different occasions. I, in a jealous, menopausal, sometimes intoxicated rage, made statements that are not true. Statements that were without foundation, absolute lies.
>
> Regretfully,
> /s/ (R. 1184)

Moreover, Mrs. Yannitelli admitted to wrongfully fabricating the letterhead of her attorneys, Moses & Singer, LLP, for the purpose of sending letters out to six (6) different people. (R. 1185-86)

These blows to Mrs. Yannitelli's credibility were further buttressed by claims made by Mr. Heller, and others, that Mrs. Yannitelli stole various properties from them. *See e.g.*, (R. 1425-1427, 1429-30, 1557-65).

If anyone was entitled to a hearing, and accordingly, the right to confront and cross-examine the only material witness against him, it was clearly Mr. Heller. The denial of such basic rights clearly violated Mr. Heller's due process rights, a point immediately raised on his first appeal. (R. 19-21).

POINT III
THE CRIMINAL FORFEITURE IN THE INSTANT CASE CLEARLY VIOLATES THE EIGHTH AMENDMENT.

Respondents' characterization of the tremendous punitive sanctions imposed against Petitioner as "the failure of the

trial court to award him an additional fee," is, clearly erroneous. First, Justice Cohen clearly awarded Mr. Heller his fee of one-third of the settlement proceeds in the case. (P.App. 12a). Then, summarily, without regard to procedure, limits or restraint, found that Mr. Heller "by his conduct" forfeited his fee. (P.App. 12a). Under any analysis, the forfeiture was punitive, and thus, the protections of the Eighth Amendment were clearly applicable.

Respondents' egregious misreading of *United States v. Ursery* notwithstanding, the Eighth Amendment's "harm v. penalty" analysis clearly applies to a punitive forfeiture. 518 U.S. 267, 116 S.Ct. 2135 (1996). In fact, *Ursery* itself notes the difference, as did Petitioner, that this Court "distinguished civil penalties such as fines from civil forfeitures that are in rem." *Id.*, at 283, 116 S.Ct., at 2145; *see also, id.*, at 275, 116 S.Ct., at 2141 ("In reaching its conclusion the [*Various Items*] Court drew a sharp distinction between in rem civil forfeitures and in personam civil penalties such as fines . . .")(citing *Various Items of Personal Property v. United States*, 282 U.S. 577, 51 S.Ct. 282 (1931).

Ursery also notes the difference between punitive and remedial forfeitures, a distinction surely lost by Respondents' reading. *Id.* The remedial purpose noted by *Ursery* was that 21 U.S.C. §881(a)(6) "applies to 'proceeds' of illegal drug activity, it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts."

Id., at 291, 116 S.Ct., at 2148-49.

Here, the severe and criminally punitive forfeiture which was imposed upon the Petitioner without a hearing or jury trial served no remedial purpose. Moreover, Mr. Heller did not profit from any illegal acts. Rather, Mr. Heller was entitled to his fee due to eighteen (18) years of difficult legal representation over which he had little choice as to whether to continue his representation.[4]

---

[4]In 1992, Mr. Heller applied to Justice Greenfield to be relieved as counsel. (R. 1370-73) Mr. Heller made this request because his client refused to pay monies that he lent her so that she would not be pressured to settle this case for $200,000, and because his client stole promissory noted from his office, and also stole property belonging to Mr. Heller's other friends and clients. *Id.*

Justice Greenfield persuaded Mr. Heller to remain on as counsel, and Mr. Heller reluctantly did so, after monies were placed in escrow to secure the loans Mr. Heller made in good faith to his client. *Id.*; *see also* (R. 1420). Unfortunately, Mrs. Yannitelli, claiming that she was 'starving,' persuaded Mr. Heller to release the funds from escrow to her until they were all dissipated. (R. 1372-73). To date, Mr. Heller has not been paid back by Mrs. Yannitelli for any monies she owed him.

Mrs. Yannitelli was clearly aware of any conflict that existed between herself and Mr. Heller, inasmuch as she knew about Mr. Heller's claims against her in 1992. (R. 1372). Nevertheless, Mrs. Yannitelli clearly chose to waive any conflicts, and continue with Mr. Heller as her attorney, only later to use whatever disagreements she had with Mr. Heller against him to avoid paying his fees for services rendered.

Other instances cited by the Respondents are completely irrelevant, and are apparently offered by Respondents for improper purposes, rather than for the Court's consideration of the instant matter.

POINT IV

JUSTICE BEVERLY COHEN DEMONSTRATED CLEAR BIAS AGAINST THE PETITIONER, AS WELL AS SIGNIFICANT PECUNIARY INTEREST IN THE OUTCOME OF THE CASE.

Clearly, Justice Beverly Cohen demonstrated clear bias against the Petitioner, inasmuch as she refused to grant the Petitioner a hearing, while plainly stating in her decision that Mr. Heller disputed the accusations hurled upon him by his client. Even a cursory review of the Court's decision on August 16, 1996 reveals the bias of acting Justice Cohen.

Moreover, Justice Cohen knew that Mr. Heller, a powerful political protagonist, would support a candidate against her in her next election. What better way to disable your political enemy than to deprive him of over $700,000?

Clearly, Justice Cohen exhibited a direct and pecuniary interest in depriving Mr. Heller of his fees to weaken his ability to oppose her and possibly oust her from the bench in the upcoming election.

Mr. Heller has, beyond doubt, been an outspoken advocate in both the legal and

political fields. He does not deny his persistence as an advocate, nor his inability to walk away from any battle, to the enormous benefit of his clients. As a result of his forty (40) plus outspoken years in New York City's legal and political realms, Petitioner clearly has enemies in both. Being deprived of his fee in excess of $700,000, is an unfortunate situation resulting from this fact.

All attorneys who take and fund cases on a contingency basis due to the inabilities of their clients to pay the costs necessary to assert their rights are affected by this decision. When a client hurls accusations at her attorney, after all of the work is completed and the benefits have been received, and solely to deprive her attorney of the returns on his substantial investments of money and effort, a hearing to determine the veracity of such claims, at the very least, must be guaranteed by due process.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Respectfully submitted,

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